The regulation of charities and civil society

Garton, Jonathan Edward James

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by

Jonathan Edward James Garton

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Abstract

This thesis considers when it will be appropriate to regulate charities and other civil society organisations and how this might best be accomplished.

The first part of the thesis is a critical analysis of the constitution and functions of organised civil society. It argues that it is inappropriate to use legal and financial definitions as the basis of regulation and instead defines the sector by reference to its structure and functions. In relation to structure, the characteristics of volunteerism, independence, organisation and non-profit distribution are evaluated and adopted. In relation to function, it argues that whilst there is no single over-arching purpose of organised civil society, sector activity can be conveniently divided into eight overlapping categories. These are critically evaluated with reference to sociological theories of civil society.

The second part of the thesis builds on the preceding analysis to develop a theory of civil society regulation. Traditional economic and social justifications for regulation and their relevance to organised civil society are considered. The thesis argues that there are six specific justifications for the regulation of civil society organisations: (i) preventing anti-competitive practices, (ii) controlling campaigning, (iii) ensuring trustworthiness, (iv) co-ordinating the sector; (v) rectifying philanthropic failures; and (vi) preventing challenges to organisational quiddity. The analysis concludes with an examination of the relationship between organised civil society and the other sectors and between civil society's constituent parts. In particular, the thesis argues that, in terms of structure and function, no meaningful distinction can be drawn between the charitable sector and wider civil society.

The final part of the thesis considers the implementation of this theory. It provides a comparative analysis of the institutions which might be charged with regulating the sector and an evaluation of the regulatory strategies available to them.

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CHAPTER 1

Introduction

A. NATURE OF CIVIL SOCIETY

This thesis is concerned with the regulation of charities and organised civil society. Civil society is the label given to the loose collective of organisations that operate outside the public sector, the private market and the family unit. Broadly speaking, these organisations exist to carry out those social functions that other sectors 'either avoid … or take for granted'.[1] In practice, this translates as a sector that is 'dedicated to community benefit or social purposes'.[2] It is engaged in a diverse collection of activities ranging from those which benefit society as a whole, through to those which are useful to socially disadvantaged minority groups. Charities form a subset of wider civil society. They are engaged in the same broad functions as the rest of the sector, but are distinguishable from other civil society organisations by their pursuit of specific purposes, in specific ways, which are approved by the state and rewarded with certain fiscal and other benefits.

(1) Historical Development of Civil Society

It is impossible to say with any degree of certainty exactly when organised civil society as we understand it today came into existence. Some have suggested that it has been a continuous presence throughout history, albeit one which was often not explicitly recognised.[3] There is certainly evidence of civil society activity in ancient Greece and Rome, with *collegia* – organisations formed for common social pursuits among other purposes[4] – dating back 'earlier than recorded history'.[5] So far as the

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[1] Gassler, R., *The Economics of Nonprofit Enterprise: A Study in Applied Economic Theory* (Lanham, Maryland, University Press of America, 1986) at 13.
[2] Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (London, HMSO, 2002), para 2.12.
[3] See for example Levitt, T., *The Third Sector: New Tactics for a Responsive Society* (New York, AMACOM, 1973) at 49.
[4] The *Oxford Latin Dictionary* defines the *collegium* as a 'guild, club, society, fraternity (of men belonging to the same trade or having some common tie or interest)' (Glare, P., *Oxford Latin Dictionary* (Oxford, Clarendon, 1968) at 350).

United Kingdom is concerned, the roots of organised civil society are often found in two medieval institutions, one ecclesiastic and one secular: the Church and the guild. From the twelfth century onwards,[6] the Roman Catholic Church – and later, following Henry VIII's repudiation of papal supremacy in 1534, the Church of England – was routinely engaged in the provision of social welfare. At the outset of this welfare provision, the Church was very much part of the state, being a 'temporal authority rivalling the secular state'[7] and with the majority of its activities being funded by taxation, and so it would be inaccurate to label this civil society activity. However, the position gradually shifted over the centuries and the Church came to lose much of its governmental character.[8] Taxation gave way to funding through voluntary donations. The end result was an organisation which operated outside the private market but which no longer fell comfortably inside the public sector, and which relied upon the philanthropy of its wealthy adherents to fund its social purposes. At the same time that the Church was acting as the main provider of social welfare based on philanthropy, the guilds were carving out a similar niche for themselves based on the principle of mutuality. Descended from warrior fraternities, these began as social groups 'bound together by ties of rite and friendship, offering mutual support to … members',[9] and carried out functions ranging from the provision of burials to the economic assistance of their poor members.[10] During the twelfth century these were superseded by trade-based craft-guilds,[11] which continued to provide mutual aid for their members but which also engaged in broader social activities, such as the foundation of hospitals and schools,[12] providing a secular alternative to the Church for philanthropists.

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[5] Duff, P., *Personality in Roman Private Law* (Cambridge, CUP, 1938) at 103; noted in Black, A., *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (London, Methuen, 1984) at 3.

[6] Following a papal decree of Gregory IX approved by the 4th Lateran Council in 1215. See Jones, G., *History of the Law of Charity 1532 – 1827* (Cambridge, CUP, 1969) at 3; also Chesterman, M., *Charities, Trusts and Social Welfare* (London, Weidenfeld and Nicolson, 1979) at 11.

[7] Chesterman, above n 6 at 11.

[8] Although the Church of England remains established at the time of writing.

[9] Black, above n 5 at 3.

[10] Black, above n 5 at 4.

[11] See generally Black, above n 5, Ch 1.

[12] Chesterman, above n 6 at 13.

By the reign of Elizabeth I, organised civil society was firmly established in the social fabric and its significance was recognised by the state. The Court of Chancery recognised the charitable use (and later the charitable trust) as a means of making gifts to charitable causes, granting the device privileges which were not accorded to private uses and trusts.[13] In particular, charitable uses were exempt from the rule requiring certainty of object[14] and the rule against perpetual duration,[15] and they also fell outside statutory and common law limitation periods.[16] The preferred status of charitable gifts was given a statutory footing at the turn of the seventeenth century with the Statutes of Charitable Uses 1597 and 1601 (the latter being a redrafted version of the former). The latter remained in force until 1853 and continues to form the basis of modern legal charity, as all charitable purposes must fall within the 'spirit and intendment' of the activities listed in its Preamble.

(2) Civil society in the 21st Century

Today, organised civil society is 'abundant and thriving'.[17] It consists of a wide variety of institutions including schools and universities, churches and other ecclesiastical associations, pressure groups, hospitals, eleemosynary organisations, mutual societies, social enterprises, trade unions and local community organisations. It is estimated that there are between 500,000 and 700,000 civil society organisations in total in the United Kingdom,[18] and whilst there are no statistics available for the sector as a whole, it is reckoned that 'general charities'[19] alone have a combined workforce of over 3.5 million staff and volunteers,[20] and a combined annual income of over £30.6 billion.[21]

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[13] Though note that the courts were not always motivated by a desire to encourage charitable giving when doing so: see below Ch 2 at nn 51 – 54 and associated text.
[14] *Moggridge* v *Thackwell* (1802) 7 Ves 360; *Mills* v *Farmer* (1815) 1 Mer 55.
[15] *Goodman* v *Saltash Corporation* (1882) 7 App Cas 633 at 642 *per* Lord Selborne.
[16] See e.g. *Attorney General* v *Christ's Hospital* (1834) 3 My & K 344.
[17] Levitt, above n 3 at 60.
[18] Prime Minister's Strategy Unit, above n 2, para 2.10.
[19] General charities consist of all registered charities excluding 'non-departmental public bodies and quasi non-governmental organisations … and financial institutions allocated to the corporate sector in national accounts' (Prime Minister's Strategy Unit, above n 2, para 2.22).
[20] Prime Minister's Strategy Unit, above n 2, paras 2.22 – 2.33.
[21] Prime Minister's Strategy Unit, above n 2, para 2.22. £15.6 billion of this represents actual income; £15 billion represents the value of unpaid work.

B. REGULATION

At a general level, regulation means 'any form of behavioural control, whatever the origin'.[22] Within the legal context, the term is sometimes accorded a similarly broad definition, referring to 'the whole realm of legislation, governance and social control'.[23] However, the academic study of regulation as a discrete field, a collaboration between the disciplines of law and economics, is concerned with a narrower definition. In this context, regulation is generally taken to mean the 'sustained and focused control exercised by a public agency over activities that are valued by a community'.[24] The aim of the sustained and focused control is to:[25]

> direct or encourage behaviour which (it is assumed) would not occur without such intervention ... [and in doing so] correct perceived deficiencies in the market system in meeting collective or public interest goals.

As will become apparent throughout the thesis, this definition needs some refinement – for example, regulation may be carried out by more than one public agency; or it may take the form of self-regulation, whereby the regulated sector keeps its own house in order. Nevertheless, this definition serves as a useful starting point. Accordingly, this thesis is concerned with the sustained and focused control of the organisations that constitute civil society, with the aim of correcting perceived deficiencies that prevent the sector from maximising its usefulness to society.

C. CIVIL SOCIETY AND REGULATION

The regulation of organised civil society, and more specifically the charitable sector, has a long heritage. In England and Wales,[26] the Court of Chancery, and later the

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[22] Ogus, A., *Regulation: Legal form and economic theory* (Oxford, Clarendon Press, 1994) at 1.
[23] Majone, G., 'Introduction' in Majone, G. (ed.), *Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States* (London, Pinter, 1990) at 1.
[24] Selznick, P., 'Focusing Organizational Research on Regulation' in Noll, R. (ed.), *Regulatory Policy and the Social Sciences* (Berkley and LA, University of California Press, 1985) at 363. Cited in Ogus, above n 22 at 1. See also e.g. Baldwin, R., and Cave, M., *Understanding Regulation Theory, Strategy, and Practice* (Oxford, OUP, 1999) at 2; Majone, above n 23 at 1.
[25] Ogus, above n 22 at 1 – 2.
[26] In the context of charity law, references throughout this thesis to England should be taken to include Wales as well.

Chancery Division of the High Court,[27] recognised charitable uses at least as far back as the second half of the fifteenth century,[28] and prior to this the ecclesiastical courts upheld bequests *ad pias causa*.[29] The first Charity Commissioners were provided for in 1597 by the same Act which gave charity law its statutory footing,[30] with the current Commission being established in 1853,[31] and the Attorney General's jurisdiction to enforce charitable uses by way of 'information' – the precursor of the modern relator action – was firmly entrenched as a method of enforcement by the end of the seventeenth century.[32] These three institutions – the courts, the Charity Commission and the Attorney General – continue to be chiefly responsible for regulation today. Whilst the past thirty years have seen the study of organised civil society develop into a field of research in its own right,[33] little academic attention has been focused upon the issue of regulation. In spite of this, a number of jurisdictions – in particular England, Canada, Ireland, New Zealand, Scotland and South Africa – are currently in the process of introducing or reviewing existing systems of regulation. Another, Australia, recently implemented minor reforms.[34] The law relating to charities in each of these jurisdictions has developed from the English system, although, before the reforms, England was the only country among them with a sector-specific regulator in the Charity Commission.

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[27] Following the Judicature Act 1873.

[28] See Jones, above n 6 at 7.

[29] Although jurisdiction was not simply transferred from one to the other: the ecclesiastical courts continued to entertain such bequests into the fifteenth century (see Jones, above n 6 at 5).

[30] Statute of Charitable Uses 1597; replaced four years later by the Statute of Charitable Uses 1601.

[31] Charitable Trusts Act 1853, ss 1 – 8. Under the current law, it is the Commissioners themselves, rather than the Commission, who are charged with regulation (Charities Act 1993, s 1). However, the *de facto* position is that regulation is carried out by the Commission: see below Ch 6 nn 74 – 77 and associated text.

[32] See Jones, above n 6 at 55.

[33] At the time of writing, there are several journals (e.g. *International Journal of Not-for-Profit Law* (www.icnl.org, International Center for Not-for-Profit Law, 1998 onwards); *Nonprofit and Voluntary Sector Quarterly* (Thousand Oaks and London, Sage, 1989 onwards); *Voluntas* (New York, Kluwer, 1990 onwards)) and university departments (e.g. in the UK the Centre for Civil Society, London School of Economics founded in 1987 and the Institute for Philanthropy, University College London, founded in 2000; also the Centre for Civil Society at UCLA and the Centre for Nonprofit Management at Trinity College, Dublin) dedicated to civil society research.

[34] Accordingly, whilst the focus of this thesis is on civil society more generally (see generally below Ch 2), the contextual analysis refers primarily to these jurisdictions (see below at 34).

(1) England

In England and Wales, the current legal reforms began in 1998 when the Charity Commission, the non-ministerial government department which is responsible for determining the charitable status of organisations according to the principles laid down in caselaw, commenced a review of its register of charities to ensure that the legal concept of charity reflected (i) the popular understanding of charity[35] and (ii) the 'changing social and economic circumstances' since the Statute of Charitable Uses four centuries before.[36] The review was undertaken in response to a report of the Select Committee on Public Accounts, which identified the accuracy of the register of charities as an area of concern[37] and accused the Commission of failing to use its regulatory powers 'to anything like their full potential'.[38] Following a series of consultation papers, the Commission issued new guidance on a variety of issues, ranging from the recognition of new charitable purposes and the modernising of existing charitable purposes,[39] to questions of more general regulatory concern.[40] This

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[35] Charity Commission, *RR1: The Review of the Register of Charities* (London, Charity Commission, 2001), paras 23 - 24.

[36] Charity Commission, above n 35, para 4. See generally Mitchell, C., 'Reviewing the Register' in Mitchell, C. and Moody, S. (eds.), *Foundations of Charity* (Oxford, Hart, 2000).

[37] Select Committee on Public Accounts, 28th Report for 1997 – 1998 Session: Charity Commission – Regulation and Support of Charities, para 26.

[38] Select Committee on Public Accounts, above n 37, para 5. The Select Committee's interest in the regulation of the charitable sector is itself symptomatic of an increased political awareness of organised civil society which emerged during the 1990s. This was largely the result of New Labour's desire to distance itself from both the market-oriented politics of the Conservative Party and the state-oriented politics of 'old' Labour (see e.g. Blair, T., *The Third Way: New Politics for the New Century* (London, Fabian Society, 1998)), which Kendall suggests was, in turn, influenced by an increase in quantitative research and associated policy documents focusing on the sector (see generally Kendall, J., 'The Mainstreaming of the Third Sector into Public Policy in England in the Late 1990s: Whys and Wherefores' (2000) 28 *Policy and Politics* 541 esp at 546 – 551, 555; also Kendall, J., *The Voluntary Sector* (London, Routledge, 2003), Ch 3).

[39] At the time of writing these are Charity Commission, *RR1a: Recognising New Charitable Purposes* (London, Charity Commission, 2001); *RR2: Promotion of Urban and Rural Regeneration* (London, Charity Commission, 1999); *RR3: Charities for the Relief of Unemployment* (London, Charity Commission, 1999); *RR4: The Recreational Charities Act 1958* (London, Charity Commission, 2000); *RR5: The Promotion of Community Capacity Building* (London, Charity Commission, 2000); *RR9: Preservation and Conservation* (London, Charity Commission, 2001); *RR10: Museums and Art Galleries* (London, Charity Commission, 2002); *RR11: Charitable Status and Sport* (London, Charity Commission, 2003); *RR12: The Promotion of Human Rights* (London, Charity Commission, 2003); *RR13: Promotion of the Voluntary Sector for the Benefit of the Public* (London, Charity Commission, 2004).

led to concerns that the Charity Commission was effectively redefining charitable status and hence acting outside its statutory remit.[41] At the start of the review the Commission stated that:[42]

> In the exercise of our powers to recognise organisations as charitable for the purposes of the Register we act in a way which seeks to predict the approach which would be taken by the courts if the charitable status of the particular organisation was being determined by the courts. Accordingly we do not have the power to change the law beyond that empowered by the court …

However, whilst the Charities Act 1993 charges them with maintaining the register of charities 'in such manner as they think fit',[43] and also with removing from the register any organisation 'which no longer appear[s] to the Commissioners to be a charity',[44] the Act is silent as to whether the Commissioners have the authority to second-guess the courts in this fashion. Furthermore, whilst the Commissioners have concurrent jurisdiction with the High Court in relation to charity proceedings,[45] this is specifically limited to designated administrative purposes as opposed to matters of substantive charity law.[46]

In light of these limitations inherent in the review of the register, in 2002 the Prime Minister's Strategy Unit published its own consultation paper on the legal and regulatory framework of the charitable 'and wider not-for-profit sector'.[47] Its recommendations included the following key reforms: (i) the statutory redefinition of the criteria for charitable status, replacing the existing four heads of charity with ten

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[40] Charity Commission, *CC60: The Hallmarks of an Effective Charity* (London, Charity Commission, 2004); *RR6: Maintenance of an Accurate Register* (London, Charity Commission, 2000); *RR7: The Independence of Charities from the State* (London, Charity Commission, 2001); *RR8: The Public Character of Charity* (London, Charity Commission, 2001); *RR14: Promoting the Efficiency and Effectiveness of Charities and the Effective Use of Charitable Resources for the Benefit of the Public* (London, Charity Commission, 2004).

[41] National Council of Voluntary Organisations, *Charity Commission Review of the Register: NCVO's Response to the Draft Framework for the Review* (London, NCVO, 1998).

[42] Charity Commission, above n 35, para 18.

[43] Charities Act 1993, s 3(1).

[44] Charities Act 1993, s 3(4).

[45] Charities Act 1993, s 16(1).

[46] Namely the creation of schemes for the administration of a charity (s 16(1)(a)); the appointment and removal of trustees (s 16(1)(b)); and certain property transactions (s 16(1)(b)).

[47] Prime Minister's Strategy Unit, above n 2.

new 'purposes of charity' and compelling charities to demonstrate public benefit in their pursuit of these purposes;[48] (ii) the creation of two new legal forms - for charities, the 'charitable incorporated association',[49] and for social enterprises, the 'community interest company' (iii) the introduction of self-regulation of fundraising;[50] (iv) the piloting of quality control through 'performance indicators and benchmarking';[51] and (v) the re-branding of the Charity Commission as the Charity Regulation Authority.

A number of these proposals have been carried forward by the Labour government. Legislation establishing the community interest company was enacted in September 2004,[52] and, at the time of writing, a Charities Bill is before the House of Lords.[53] The Bill makes a number of key changes to both charity law and the regulatory framework in which charities operate. In relation to charity law, the Bill replaces the existing four heads of charity – the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community[54] – with twelve purposes comprising amended versions of the existing heads,[55] plus eight new ones:[56] the advancement of health or the saving of lives;[57] the advancement of citizenship or community advancement;[58] the advancement of the arts, culture, heritage or science;[59] the advancement of amateur sport;[60] the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony, equality or diversity;[61] the advancement of environmental protection or

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[48] Prime Minister's Strategy Unit, above n 2, para 4.18.
[49] Prime Minister's Strategy Unit, above n 2, para 5.44.
[50] Prime Minister's Strategy Unit, above n 2, para 6.32.
[51] Prime Minister's Strategy Unit, above n 2, para 6.40.
[52] Companies (Audit, Investigations and Community Enterprise) Act 2004, Part 2.
[53] The Bill was placed before the House on 21 December 2004 and its second reading took place on 20 January 2005.
[54] *Income Tax Special Purposes Commissioners* v *Pemsel* [1891] AC 531.
[55] Under s 2(2)(a) of the Bill, the 'relief' of poverty will become the 'prevention or relief' of poverty.
[56] Although all but two of these are existing charitable purposes that currently fall under the fourth head: see below Ch 5 at 182.
[57] Charities Bill 2004, s 2(2)(d).
[58] Charities Bill 2004, s 2(2)(e).
[59] Charities Bill 2004, s 2(2)(f).
[60] Charities Bill 2004, s 2(2)(g).
[61] Charities Bill 2004, s 2(2)(h).

improvement;[62] the relief of those in need;[63] and the promotion of animal welfare.[64] It also abolishes the presumption of public benefit in relation to the relief of poverty, the advancement of education and the advancement of religion.[65]

In relation to the regulatory framework, the Charity Commission's role as regulator is consolidated,[66] and it is given a detailed mandate with regard to its regulatory objectives and general functions.[67] Currently, the Commission has a fairly non-specific general function, namely 'promoting the effective use of charitable resources',[68] which has meant that its attempts to modernise the charitable sector, such as the review of the register, have sometimes met with accusations of lack of legitimacy.[69] Under the Bill, the Commission will have five primary objectives of (i) ensuring public confidence in the sector,[70] (ii) promoting awareness of the public benefit requirement,[71] (iii) ensuring charities comply with their legal obligations,[72] (iv) facilitating the 'economic and social impact' of the sector[73] and (v) ensuring the accountability of the sector to 'donors, beneficiaries and the general public'.[74] The other key feature of the Bill is the creation of a Charity Appeal Tribunal to hear appeals from certain decisions of the Commission, including those relating to registration or removal from the register of charities.[75]

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[62] Charities Bill 2004, s 2(2)(i).
[63] Charities Bill 2004, s 2(2)(j).
[64] Charities Bill 2004, s 2(2)(k).
[65] Charities Bill 2004, s 3(2).
[66] The offices of Charity Commissioner are abolished (Charities Act 1993, s 1A(1) inserted by the Charities Bill 2004, s 6), and their 'property, rights and liabilities' are transferred to the Commission, which is established as a corporation (Charities Bill, s 6(4).
[67] Charities Act 1993, ss 1B, 1C, inserted by the Charities Bill 2004, s 6.
[68] Charities Act 1993, 1(3).
[69] See Mitchell, C., 'Reviewing the Register' in and Mitchell, C., and Moody, S., (eds.), *Foundations of Charity* (Oxford, Hart, 2000) at 198.
[70] Charities Act 1993, s 1B(2) and (3), inserted by the Charities Bill 2004, s 7. This is currently what the Commission believes is its regulatory function (see Charity Commission, *CC2: Charities and the Charity Commission* (London, Charity Commission, 2002), para 4) although there is no statutory authority for this.
[71] Charities Act 1993, s 1B(2) and (3), inserted by the Charities Bill 2004, s 7.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] Charities Bill 2004, s 8 and Sched 4, Table, Col 1.

(2) Other jurisdictions

Australia

Reform of civil society regulation in Australia began in 2000 with the creation of the Inquiry into the Definition of Charities and Related Organisations, which was set up at federal level to determine whether the existing laws, based on the English model of charity, were 'appropriate to the modern social and economic environment'.[76] The Inquiry's report,[77] published the following year, recommended a series of reforms including (i) redefining public benefit to include a requirement of altruism;[78] (ii) extending charitable status to self-help groups;[79] (iii) abolishing the requirement that charitable purposes must fall within the spirit and intendment of the Preamble to the Statute of Charitable Uses 1601;[80] (iv) reconstituting the four heads of charity as seven separate purposes;[81] and (v) establishing a regulatory agency to administer the charitable sector.[82] The first four of these recommendations appeared in the federal Charities Bill 2003, but the Bill was dropped in May 2004 due to lack of 'clarity and certainty' in the drafting.[83] However, although the four heads of charity remain in place, statutory provision has been made for the extension of charitable status to self-help groups and closed religious orders,[84] effective 1 July 2004. There are no plans to establish a regulatory agency, which has already been described as a 'fatal flaw' in the reforms.[85]

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[76] Prime Minister of Australia, Press Release, 18 September 2000.
[77] Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Canberra, Commonwealth of Australia, 2001).
[78] Charities Definition Inquiry, above n 77, recommendation 7.
[79] Charities Definition Inquiry, above n 77, recommendation 8.
[80] Charities Definition Inquiry, above n 77, recommendation 11.
[81] Charities Definition Inquiry, above n 77, recommendation 13
[82] Charities Definition Inquiry, above n 77, recommendation 26.
[83] Treasurer of the Commonwealth of Australia, *Final Response to the Charities Definition Inquiry*, Press Release No 031, 11 May 2004.
[84] Extension of Charitable Purpose Act 2004, ss 4, 5.
[85] McGregor-Lowndes, M., 'Australian Charity Law Reform Proposals' [2002] IJNL (www.icnl.org/journal/journal.html) at 9.

Canada

In Canada, the Report of the Panel on Accountability and Governance in Canada's Voluntary Sector suggested in 1999 that a task force of state and voluntary sector representatives be established to formulate a modernised concept of legal charity.[86] This task force published its final report in 2003,[87] which recommended a general overhauling of the regulatory regime and mooted the creation of a Charity Commission along the lines of the English model.[88] In the Federal Budget 2004, the government announced plans to implement many of the recommendations in the report using the model of an enhanced Charities Directorate.[89]

Ireland

Following a report from the Law Society,[90] the Irish government published a consultation paper in December 2003,[91] which called for responses to three general proposals: (i) a statutory definition of charity based on the common law definition but with 'greater clarity';[92] (ii) the creation of regulatory body for charities based on similar lines to the English Charity Commission;[93] and (iii) the creation of a register of charities to be maintained by the regulator.[94] The report which followed this

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[86] Voluntary Sector Roundtable Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (www.vsr-trsb.net, Voluntary Sector Roundtable, 1999).
[87] Voluntary Sector Initiative (Canada) Joint Regulatory Table, *Strengthening Canada's Charitable Sector* (Ottawa, Voluntary Sector Initiative, 2003).
[88] Above n 87 at 133. The task force also put forward three alternative regulatory models (namely (i) an enhanced Charities Directorate of the Canada Revenue Agency, the body with responsibility for determining charitable status for tax purposes; (ii) an enhanced Charities Directorate working alongside a voluntary sector agency which would advise the directorate on policy; and (iii) an enhanced Charities Directorate working alongside a Charity Commission, with the latter responsible for all aspects of regulation except 'compliance monitoring and auditing' (at 130)) but did not prefer one model over the others: see generally above n 87 and Ch 7.
[89] Delivered 23 March 2004. See Department of Finance Canada, *The Budget Plan 2004* (Ottawa, Department of Finance Canada, 2004) at 175 – 176; also at 349 - 364.
[90] Law Society of Ireland's Law Reform Committee, *Charity Law: The case for reform* (www.lawsociety.ie, Law Society of Ireland, 2002).
[91] Department of Community, Rural and Gaeltacht Affairs, *Establishing a Modern Statutory Framework for Charities* (DCRGA, Dublin, 2003).
[92] Above n 91 at 7.
[93] Above n 91 at 8 – 9; also 15 - 16.
[94] Above n 91 at 13 – 14.

consultation, released in September 2004,[95] notes that the majority of responses were in favour of all three proposals,[96] with the creation of a register of charities receiving unanimous support.[97]

New Zealand

In 2001, the New Zealand government published the discussion document *Tax and Charities*,[98] which considered a range of reform options relating to the definition of charity and the tax breaks available to charities. This was followed the next year by the report of Treasury working party, which recommended the creation of a Charity Commission based on the English model.[99] Pursuant to this, a Charities Bill was presented to Parliament in March 2004.[100]

Scotland

In 2001, the Scottish Charity Law Review Commission (McFadden Commission) undertook a whole-scale review of charity law in Scotland.[101] The Commission's report recommended (i) the establishment of a regulatory agency, again along the lines of the English model, which would be charged with determining charitable status,[102] and maintaining a register of charities;[103] and (ii) a new definition of charity based on public benefit, non-profit distribution and independence.[104] The Scottish Executive

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[95] Breen, O., *Establishing a Modern Statutory Framework for Charities: Report on the Public Consultation for the Department of Community, Rural and Gaeltacht Affairs* (DCRGA, Dublin, 2004).
[96] Breen, above n 95 at 7, 23 and 26.
[97] Breen, above n 95 at 26.
[98] Inland Revenue Department Policy Advice Division, *Tax and Charities* (www.taxpolicy.ird.govt.nz/publications/files/taxprivdd.pdf, Inland Revenue Department Policy Advice Division, 2001).
[99] Treasury Working Party, *Report by the Working Party on Registration, Reporting and Monitoring of Charities* (www.treasury.govt.nz/charities/report-wprrmc.pdf, New Zealand Treasury, 2002).
[100] The Social Services Select Committee considered the Bill and in December 2004 recommended that it be passed with amendments.
[101] Scottish Charity Law Review Commission, *Charity Scotland The report of Scottish Charity Law Review Commission* (www.scotland.gov.uk/justice/charitylaw/csmr/csmr-00.htm, Scottish Charity Law Review Commission, 2001).
[102] Scottish Charity Law Review Commission, above n 101, recommendation 1.
[103] Scottish Charity Law Review Commission, above n 101, recommendation 16.
[104] Scottish Charity Law Review Commission, above n 101, recommendation 2. A fourth criterion – that a charity be 'non-party political' – would seem to be inherent in the

responded in the short term by establishing the Office of the Scottish Charity Regulator as an executive agency of the Scottish Executive Development Department, to regulate the sector on a temporary basis and oversee the implementation of a new regulatory framework. The Charities and Trustee Investments (Scotland) Bill was introduced to the Scottish Parliament on 15 November 2004, and proposes to re-establish the Office of the Scottish Charity Regulator as an independent statutory body along the lines of the English Charity Commission;[105] however, in the interests of uniformity,[106] a new definition of charity will be based on the twelve purposes contained in the English Charities Bill.[107]

South Africa

Finally, we can briefly note that the South African Law Commission lists the 'legal position of voluntary associations' as a project 'currently receiving attention'.[108] However, no consultation paper has emerged at the time of writing.

(3) Common Themes

There are a number of common themes running through the reforms outlined above: all focus almost exclusively on the charitable sector as opposed to wider organised civil society; all are concerned with ensuring that the definition of charity reflects contemporary social need; and all except England are concerned with establishing new sector-specific regulatory agencies. However, what is most striking is the fact that all

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requirement of independence (Scottish Charity Law Review Commission, above n 101, recommendation 2; para 1.42); the reason for making this a fourth criterion appears to be for emphasis, as the report recommends removing the ban on political purposes *per se* (paras 1.52 – 1.54; recommendation 6).

[105] Charities and Trustee Investments (Scotland) Bill, s 1.

[106] See Scottish Executive, *Draft Charities and Trustee Investments (Scotland) Bill: Consultation* (Edinburgh, Scottish Executive, 2004) at 9.

[107] Charities and Trustee Investments (Scotland) Bill, s 7(2). Although the purposes in the Bill are clearly influenced by the English reforms, they are not, in fact, identical to those listed in s 2(2) of the Charities Bill 2004. As well as some purely linguistic differences (cf 'the advancement of citizenship' and 'the advancement of civic responsibility'), there are two noteworthy distinctions: (i) the fourth head under the English Bill is 'the advancement of health or the saving of lives', whereas the Scottish equivalent is simply 'the advancement of health'; and (ii) the tenth head under the English Bill – the relief of those in need – is replaced in the Scottish version with two separate heads relating to the provision of accommodation (s 7(2)(j)) and the provision of care (s 7(2)(k)).

the reform proposals have been made on the assumption that regulation of organised civil society – and more specifically, regulation of the charitable sector – is justified. None of the reform bodies takes a step back to consider whether this is indeed the case, and to ask itself what a flourishing civil society might achieve, and whether regulation will enable this. Instead, they simply consider the form that regulation should take.[109]

D. OUTLINE OF THIS THESIS

This thesis is an attempt to determine (i) when it will be appropriate to regulate organised civil society and (ii) how that regulation might best be accomplished. The thesis is divided into three parts, entitled 'Understanding Civil Society', 'Towards a Theory of Civil Society Regulation' and 'Implementing Regulation'.[110]

Part One: Understanding Civil Society

In order to develop an effective and targeted theory of regulation it is first necessary to understand our subject matter and, with this in mind, the first part of this thesis is a critical analysis of the constitution and functions of organised civil society. Chapter Two ('Constitution of Civil Society') considers the constitution of the sector. It introduces the concept of sector-based analyses of society and compares civil society with the other social, economic and political areas of society: namely, the private

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[108] See www.law.wits.ac.za/salc/projects/projects.html, project 117.

[109] However, of all the state-instigated consultations noted above, only the Scottish Charity Law Review Commission was clearly in a position to adopt such an approach: its remit being simply 'to review the law relating to charities … and to make recommendations on any reforms considered necessary' (Campbell, N., *Scottish Executive Consultation on the Report of the Scottish Charity Law Review Commission* (www.scotland.gov.uk/consultations/justice/cllr-00.asp, Scottish Executive, 2001). In Canada and New Zealand, the reform bodies' terms of reference explicitly limited their remit to the implementation of regulation (Voluntary Sector Initiative (Canada) Joint Regulatory Table, above n 87 at 2; Treasury Working Party, above n 99, appendix 3). In England and Australia, there is no explicit limitation, but the reform bodies' terms of reference implicitly assume that regulation in some form is necessary (Prime Minister's Strategy Unit, above n 2, para 1.4; Charities Definition Inquiry, above n 77 at v – vi). In Ireland, no terms of reference are available for the Department of Community, Rural and Gaeltacht Affairs' consultation paper. However, the paper notes that its focus on the implementation of regulation reflects the government's commitment to 'introducing an integrated system of registration and regulation' (Department of Community, Rural and Gaeltacht Affairs, above n 91 at 6), and so it would seem likely that any consideration of whether a regulatory regime is, in fact, warranted would have fallen outside its scope.

[110] For a detailed discussion of the research methods involved, see below at 30 - 34.

sector, the public sector, the informal sector and the black market. It argues that it is inappropriate to focus on legal or financial definitions of civil society and instead advocates the use of Salamon and Anheier's definition by reference to the structural characteristics of (i) volunteerism, (ii) independence, (iii) organisation and (iv) non-profit distribution that are shared by civil society organisations.

Having determined the nature of the organisations that make up organised civil society, Chapter Three ('Functions of Civil Society') proceeds to consider their social functions. It argues that whilst the sector has no single over-arching purpose, its functions fall broadly within eight overlapping categories. The first six of these are concerned with supplying an end product, and consist of (i) supporting the private market; (ii) the provision of public goods; (iii) the delivery of complex services; (iv) the redistribution of wealth; (v) the facilitation of political action and (vi) the provision of cultural services. The final two categories are concerned with the processes by which these end products are achieved and consist of (vii) the facilitation of self-determination and (viii) the facilitation of entrepreneurship. These eight purposes are critically evaluated with reference to existing theories of civil society.

Part Two: Towards a Theory of Civil Society Regulation

The second part of the thesis is concerned with establishing when regulation of organised civil society as a collective unit will be appropriate and how it might best be implemented. The first part of Chapter Four ('Foundations of Civil Society Regulation') initiates this with an analysis of the traditional economic and social justifications for regulation, which are more usually advanced in the context of private sector regulation. It considers the relevance for the sector of issues such as the control of monopoly power, the control of externalities, information asymmetry and the redistribution of wealth. The second half of the chapter builds upon this and the model of organised civil society established in the earlier chapters to develop a rudimentary theory of civil society regulation. It suggests that there are six specific justifications for the regulation of the sector: (i) the prevention of anti-competitive practices; (ii) the control of campaigning; (iii) accountability and the prevention of maladministration; (iv) the co-ordination of the sector; (v) philanthropic failures; and (vi) the prevention of challenges to organisational quiddity.

A recurring theme in the second and third chapters is the nature of organised civil society's boundaries. Chapter Five ('Boundaries of Civil Society Regulation') returns to this and explores further the nature of the relationships between civil society and the other sectors and between civil society's constituent parts. The first half of the chapter considers how the characteristics of civil society organisations at the edge of the sector are affected by their interaction with the public and private spheres. It examines the sector's protean relationship with the state in the context of the provision of public goods, in particular the impact of contract culture, and the fluidity of the boundaries between civil society, the state and the private sector. The second half of the chapter examines the relationship between the charitable sector in England and Wales and wider organised civil society. It argues that in terms of organisational structure and function, no useful distinction can be drawn between the two. The oft-cited argument that regulation can be justified by reference to the tax relief granted to civil society organisations is also considered.

Part Three: Implementing Regulation

The final part of the thesis focuses on the implementation of civil society regulation. Chapter Six ('Models of Regulation') considers the models of regulatory institutions that might be employed by the state. It provides a comparative analysis of the different state institutions that might be charged with regulating the sector, and argues that, whilst the traditional 'executive agency' model has much to recommend it, there may be a secondary role for the courts and for some form of self-regulation. Chapter Seven ('Regulation by the Executive') discusses the tools available to an executive agency – with particular focus upon command and control regulation, incentive-based regulation and disclosure regulation – and considers which of these are most suited to the pursuit of the various regulatory goals that emerge from the analysis in Chapter Four. Finally, Chapter Eight ('Regulation by the Courts') develops the idea of a secondary role for courts as regulators of maladministration, discussed in the previous two chapters, and considers the form that this might take in light of existing public and private law systems of maladministration regulation.

By way of conclusion, Chapter Nine highlights the issues that emerge from the thesis.

E. RESEARCH METHODOLOGY

The goals of the thesis are to examine possible justifications for regulating organised civil society, and to assess the relative merits of different regulatory approaches which might be taken towards the sector. Three broad questions are addressed: (i) whether the activities undertaken by civil society organisations are distinct from the activities undertaken by the state or the market, either because they are pursued in unique ways, or because they produce unique outcomes; (ii) if so, whether it is justifiable to regulate organised civil society activities in a sector-specific way; and (iii) if it is, whether the peculiar characteristics of these activities make one type of regulation more appropriate than another.

(1) General Disciplinary and Methodological Approaches

An interdisciplinary approach is adopted when answering these questions. The thesis draws upon two bodies of contemporary theoretical literature, respectively concerned with organised civil society and regulation. Theorists working in these fields have rather different goals. Broadly speaking, the aims of civil society theorists are to explain the existence of organised civil society and to distinguish its activities from those which are typically undertaken by the market and the state. The aims of regulation theorists are to explain when the regulation of an industry or social sphere, typically one falling within the private sector, can be justified, and to identify effective methods of achieving regulatory goals. Until now, there has been little, if any, interaction between researchers working in these two fields: convention has it that civil society theory is the domain of the social and political scientist,[111] whilst regulation theory is the domain of the lawyer and economist. However, both bodies of writing offer valuable insights into the research questions identified above, and the thesis accordingly takes the form of an extended synthetic essay, using an inductive approach that builds upon critical analyses of both sets of theories in order to construct a theory of regulation which is specific to organised civil society.

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[111] Although several of the civil society theories that we shall explore are based on classical microeconomic theory.

Although the discussion is essentially theoretical, it is not entirely abstract: where relevant, connections are made between theory and examples drawn from existing regulatory regimes and reform proposals, particularly in common law jurisdictions.[112] A comprehensive analysis of the legal boundaries of the English charitable sector is also undertaken, in order to demonstrate that there are no theoretical grounds on which to differentiate between the sector and wider organised civil society for regulatory purposes. However, the general intention is not to provide a comprehensive analysis of current regulatory practice in any particular jurisdiction, and most references to practical examples are made solely in order to clarify theoretical points.

The thesis takes an inherently constructivist approach to the law, in that it presupposes that social institutions are 'amenable to intentional creation, reform and intervention' by the state,[113] and it is also normative, in that it is concerned with the development of principles *de lege ferenda* and not principles *de lege lata*.[114]

(2) Specific Research Methods

Part One takes as its main source material organised civil society theory, which seeks to explain the existence of civil society and the reasons for its presence or absence in particular social fields. A number of research methods are deployed. Generally, a unificatory approach is taken towards theories explaining civil society activity. Recent theories, such as those of Salamon[115] and Hansmann,[116] are interpreted as refining, rather than replacing, older theories, such as that of Weisbrod,[117] as the view is taken that no one theory is capable of rationalising the sector. A reductionist approach is employed to reveal possible causal links between the component characteristics of CSOs, as identified by Salamon and Anheier,[118] and their ability to perform certain social functions, although the thesis recognises that the organic nature of CSOs is such that specific causes and effects cannot always be identified and isolated. The focus of

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[112] On which see below at 34.
[113] Hunt, A., 'The Problematisation of Law in Classical Social Theory' in Banakar, R., and Travers, M., *An Introduction to Law and Social Theory* (Oxford, Hart, 2002) at 17.
[114] I.e. 'what the law ought to be' as opposed to 'what the law is'.
[115] See below Ch 3 at 72 - 81.
[116] See below Ch 3 at 65 - 70.
[117] See below Ch 3 at 63 - 65.
[118] See below Ch 2 at 48.

this part of the thesis is on secondary sources, but reference is also made to various primary sources in order to place particular ideas in a social, political and legal perspective. Specifically, reference is made to quantitative data in the public domain, primary and secondary legislation, guidelines issued by the English Charity Commission, caselaw, and statements of government policy.

The first half of Part Two is a critical analysis of the public interest theories that have traditionally been advanced to justify the regulation of private sector activities. The source material consists of those secondary sources that provide public interest justifications for regulation, as opposed to those that seek to explain why regulation occurs in practice. Inductive logical reasoning is used to synthesise a set of justifications for regulating organised civil society from this material and material from the earlier chapters. The second half of Part Two then returns to the contextual approach of earlier chapters in order to discuss the delineation of regulatory boundaries. Most notably, the second half of Chapter Five uses caselaw, Charity Commission guidelines, and legislation, to identify the boundaries of a particular regulatory regime – the charitable sector in England and Wales – and to compare these with the boundaries of organised civil society which were identified in Part One.

In Part Three a synthetic approach is used to apply accepted models and strategies of regulation, as identified in the regulation theory literature, to the theory of civil society regulation developed in the previous parts. In the first two chapters, secondary materials again form the main focus of the discussion, although some primary sources are also used to set the discussion in context. However, the final substantive chapter employs a very different method. It is concerned with regulation by the courts, a topic that is underplayed by the regulation literature.[119] Having argued earlier in the thesis that regulation by the courts may be an appropriate way of controlling maladministration in civil society organisations, it is necessary to look beyond the regulation theory that informs the preceding chapters in order to identify relevant issues. On the ground that the courts already have expertise controlling maladministration in other contexts, the chapter undertakes a doctrinal comparative analysis of the rules relating to maladministration in public law and analogous rules of

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[119] See below Ch 6 at 210 - 211.

private trust law. Accordingly, the main source materials for this chapter are caselaw and academic case commentaries.

(3) Limitations of the Thesis

Although the thesis uses a variety of methodological approaches and sources across several disciplines, and is thereby better able to identify and engage with relevant issues than a traditional black-letter law discussion, the approach taken has certain limitations.

First, the normative attitude taken towards regulation, and law generally, sidesteps the fact that neither hard nor soft legal rules are made in splendid isolation, with only the perceived public interest as motivation; law-makers at every level are influenced by external social, political, and economic forces.[120] This does not diminish the validity of our enterprise when we go out in pursuit of normative standards, but, even so, these issues should not be overlooked when the practical implementation of these normative standards comes to be considered.

Secondly, the theory of civil society regulation proposed is untested and no empirical evidence, either qualitative or quantitative, was gathered in order to test its central propositions. Had it been decided at the outset to carry out empirical research and to extrapolate a theory from the resulting data, then the lack of literature on civil society regulation would have hindered the identification of relevant issues and the design of an appropriate empirical research project. Accordingly, it was felt more appropriate, given the wealth of diverse theoretical material considering civil society and regulation separately, to formulate a synthesised theory that could subsequently be tested. It is hoped that the thesis will inform, and be tested by, future empirical projects.

Thirdly, many of the civil society theories and regulation theories relied upon are themselves untested. Although they are critically and contextually evaluated, so that they might reasonably be expected to be relatively robust, they are still, ultimately, informed suppositions. Hence it is likely that the theory of civil society regulation may need to be adapted in the future to take account of relevant empirical research. In this regard it should also be noted that the majority of theorists working in these

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[120] See e.g. below Ch 6 at nn 2 - 3 and associated text.

fields are currently Anglo-American, and it may be that reworking of the synthesised theory offered here will be required in order to give it a wider relevance. It should also be borne in mind that some of the theorists whose work informs this thesis take a positive approach to civil society, and seek to explain the phenomenon as it appears to be, but that others take a more ideological approach and are thus more concerned with establishing norms of civil society activity. For the purposes of identifying principles of sound regulation that are consistent with reality as well as internally coherent, the work of the former is most relevant.

Finally, although the analytic topic of the thesis is organised civil society, the contextual analyses are focused upon the charitable sectors in common law, rather than civil law or mixed, jurisdictions. In order to achieve an appropriate depth of analysis, it was felt desirable to focus the discussion on a small number of countries. The choice of common law jurisdictions is influenced partly by the availability of resources, and partly by the fact that those jurisdictions currently engaged in high-profile programmes of regulatory reform are all common law jurisdictions, with the exception of Scotland.[121]

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[121] Whilst it is noted above at 26 that South Africa, a civil law country, has placed regulatory reform of civil society on the agenda of the Law Commission, it is not currently engaged in any active reforms.

PART ONE

UNDERSTANDING CIVIL SOCIETY

CHAPTER 2

Constitution of Civil Society

A. INTRODUCTION

Before developing a theory of regulation it is necessary to acquaint ourselves with our subject matter. Thus, this chapter considers how organised civil society is constituted. It explains how civil society differs from other sectors and analyses the shared characteristics that connect an otherwise diverse collection of institutions. Coupled with the following chapter, which examines the functions of organised civil society, this will enable us to determine (i) the objectives we expect the sector to accomplish, (ii) the features of the sector and other factors that facilitate this and (iii) the features and other factors that hinder this. It will also reveal (iv) whether civil society activity produces externalities – that is, adverse effects on third parties. We can then begin to fashion a theory which balances the need to encourage (ii) against the need to minimise (iii) and (iv).

At this point it is prudent to say a few words on terminology. Organised civil society is commonly referred to both in the literature and practice by a variety of names. These include the voluntary sector,[1] the independent sector,[2] the non-governmental (NGO) sector,[3] the nonprofit (sometimes not-for-profit)[4] sector[5] and numerous

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[1] See e.g. the National Council for Voluntary Organisations (www.ncvo-vol.org.uk); Davis Smith, J., Rochester, C., and Hedley, R., (eds.), *An Introduction to the Voluntary Sector* (London and New York, Routledge, 1995); Dunn A. (ed.), *The Voluntary Sector, the State and the Law* (Oxford, Hart, 2000); Kendall, J., and Knapp, M., *The Voluntary Sector in the UK* (Manchester, Manchester University Press, 1996); and many other works cited in the bibliography.

[2] See e.g. the Independent Sector Coalition (www.independentsector.org); Joseph, J., *The Independent Sector and the African Renaissance: A Paradigm of Partnership and Participation* (speech delivered 1 May 1998, Arlie House, Virginia, reprinted: usembassy.state.gov/ southafrica/wwwhjj17.html).

[3] See e.g. Horton Smith, D., Seguin, M., and Collins, M., 'Dimensions and Categories of Voluntary Organizations / NGOs' (1973) 2 *Journal of Voluntary Action Research* 116; Hulme, D., and Edwards, M. (eds.), *NGOs, States and Donors Too Close for Comfort* (Basingstoke and London, MacMillan, 1997).

[4] See e.g. *International Journal of Not-for-Profit Law* (www.icnl.org, International Center for Not-for-Profit Law, 1998 onwards); International Center for Not-for-Profit Law, *Regulating Not-for-Profit Organizations* (www.icnl.org, International Center for Not-for-Profit Law, 1998); Irish, L., *The Role and Purpose of the Not-for-Profit Sector* (www.icnl.org, International Center for Not-for-Profit Law, 1995); Klingelhofer, S., and Kendall Frye, J., *Global Perspectives on Not-for-Profit Law* (www.icnl.org, International Center for Not-for-

variations on these.[6] Each of these labels focuses on one of the key characteristics of civil society at the expense of others. This is problematic, for, as discussed below,[7] none of these characteristics alone are necessary for classification as part of organised civil society. Some commentators prefer the label 'third sector'.[8] This is unsatisfactory to the extent that it might lead people to assume, erroneously, that civil society is the third choice of provider of public goods, after the private and public sectors.[9] To avoid such problems, this thesis uses the neutral phrases 'organised civil society' and 'civil society organisation' (hereafter 'CSO') throughout.[10]

B. THE SECTOR MODEL OF SOCIETY

Since the seventeenth century society has been split into different sections for analysis,

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Profit Law, 1997); Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (London, HMSO, 2002); Simon, K., *Principles of Regulation for the Not-for-Profit Sector* (www.icnl.org, International Center for Not-for-Profit Law, 1998).

[5] See e.g. Anheier, H., and Kendall, J. (eds.), *Third Sector Policy at the Crossroads An international nonprofit analysis* (London and New York, Routledge, 2001); Gassler, R., *The Economics of Nonprofit Enterprise: A Study in Applied Economic Theory* (Lanham, Maryland, University Press of America, 1986); Powell, W. (ed.), *The Nonprofit Sector: A Research Handbook* (New Haven and London, Yale University Press, 1987); Rose-Ackerman, S. (ed.) *The Economics of Nonprofit Institutions: Studies in Structure and Policy* (New York, OUP, 1986); Salamon, L., and Anheier, H. (eds.), *Defining the Nonprofit Sector A Cross-National Analysis* (Manchester and New York, Manchester University Press, 1997); and many other works cited in the bibliography.

[6] See e.g. *Nonprofit and Voluntary Sector Quarterly* (Thousand Oaks and London, Sage, 1989 onwards); Gassler, R., 'Nonprofit and Voluntary Sector Economics: A Critical Survey' (1990) 19 *Nonprofit and Voluntary Sector Quarterly* 137; Home Office, *Getting it Right Together: Compact on Relations between Government and the Voluntary and Community Sector in England* (London, HMSO, Cm 4100, 1998); Thayer Scott, J., 'Some Thoughts on Theory Development in the Voluntary and Nonprofit Sector' (1995) 24 *Nonprofit and Voluntary Sector Quarterly* 31.

[7] See below at 48 - 54.

[8] See e.g. Anheier and Kendall, above n 5; Anheier, H., and Seibel, W. (eds.), *The Third Sector Comparative Studies of Nonprofit Organisations* (Berlin and New York, Walter de Gruyter, 1990); Brock, K., *Was Seattle Significant? The Emerging Interest in the Third Sector* (www.cpsa-acsp.ca, Canadian Political Science Association, 2000); Douglas, J., *Why Charity? The Case for a Third Sector* (Beverley Hills and London, Sage, 1983); Levitt, T., *The Third Sector New Tactics for a Responsive Society* (New York, AMACOM, 1973); Seibel, W., 'Government / third-sector relationship in a comparative perspective: the cases of France and West Germany' (1990) 1 *Voluntas* 43.

[9] Those who use the term are generally clear that it makes no normative claim that third sector implies third choice.

[10] Where the unqualified phrase 'civil society' is used (e.g. in 'civil society activity') this may be taken to be shorthand for 'organised civil society'.

an approach usually attributed to Hobbes, who described the constituent parts of society as being akin to the 'muscles of a body'.[11] Originally, two sectors were identified – the marketplace, also referred to as the private sector, and the state, also referred to as the public sector.[12] However, during the eighteenth and nineteenth centuries, a number of philosophers were attracted to the idea of a 'chain of social connexions' operating outside these sectors and distinct from the family unit,[13] and, in 1975, the Commission on Private Philanthropy and Public Needs[14] acknowledged officially the existence of a distinct sector that we now recognise as organised civil society. In addition, there are also now bodies of literature pertaining to the informal (or family) sector and the black market. These five sectors are each worthy of discrete analysis, as their institutions are, in theory, 'intrinsically different' in relation to 'economic objectives, functions and behaviour'.[15] However, it is important to bear in mind that the distinctions between the sectors are not always clear-cut. Although at the heart of each sector is a core of paradigm institutions, at the edges the sectors overlap with one another. The result is that it is not always easy to say with any conviction into which sector, to the exclusion of all the others, an organisation falls.[16] Many CSOs, for example, contract with the state to carry out government functions,[17] or engage in trading activities normally associated with the private sector. The relationship between the three main sectors, and the blurring of the boundaries between them, are issues to which we shall return in Chapter Five. For the moment, it is useful to set out a brief overview of the five sectors.

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[11] Hobbes, T., *Leviathan: or The Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil* (1651; reprinted Cambridge, CUP, 1991) at 155.
[12] Hobbes' original analysis refers to the state as the 'politicall' sector, above n 11 at 155.
[13] Hegel, G., *The Philosophy of Right* (1821; translated Oxford, OUP, 1952), para 187 and generally Ch 3, part (ii); note that Hegel's definition of civil society includes not only charity (*ibid*, para 242), but also what we would today recognise as the private sector (*ibid*, paras 189 – 208). See also e.g. Ferguson, A., *An Essay on the History of Civil Society* (1767; reprinted Edinburgh, Edinburgh University Press, 1966), esp. at 51 – 57; Marx, K., *Critique of Hegel's Philosophy of Right* (1844; translated Cambridge, CUP, 1970); Tocqueville, A., *Democracy in America* (1848; reprinted London, Fontana, 1994).
[14] Commission on Private Philanthropy and Public Needs, *Giving in America: Toward a Stronger Voluntary Sector: Report of the Commission on Private Philanthropy and Public Needs* (Washington, Commission on Private Philanthropy and Public Needs, 1975).
[15] United Nations System of National Accounts 1993, para 4.17.
[16] See Kendall, J., and Knapp, M., 'A loose and baggy monster: boundaries, definitions and typologies' in Davis Smith *et al*, above n 1.
[17] See below n 73 and associated text; also Ch 3 at 71 - 72.

(1) The Private Sector

The private sector consists of organisations that exist to generate profits for distribution amongst their owners. Profit is generated by participation in the marketplace – i.e. by providing goods and services to consumers. According to classical micro-economic theory, each firm will seek to produce that quantity of their product at that price which will produce the maximum profit. The overriding aim of profit-maximisation enables microeconomic theory to predict how the private sector will behave in different situations.

(2) The Public Sector

At a crude level the public sector consists of central and local government, quangos, nationalised industries and other bodies that derive their powers from the state. Other organisations may be classed as public if they exercise a 'public function'.[18] According to public law, an organisation may be exercising a public function if it carries out an activity which would be undertaken by the state if the organisation was not already performing the task,[19] although this is not conclusive.[20] An organisation may also be exercising a public function if it carries out an activity with the support of the state,[21] which must be something more than mere recognition in legislation.[22] Finally, an organisation may be exercising a public function if it has a monopoly over

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[18] *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815.

[19] See e.g. *R v Advertising Standards Authority, ex parte Insurance Service plc* (1989) 9 Tr LR 169 where it was held the state would regulate advertising standards in the absence of self-regulation by the advertising industry; *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 All ER 833 where it was held that the state would be unlikely to regulate football in the absence of the Football Association. It also seems that an organisation will be carrying out a public function if it takes over an activity previously undertake by the state: *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; *Hampshire CC v Beer* [2003] NPC 93.

[20] See e.g. *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 where the Master of the Rolls (the rest of the Court of Appeal disagreeing on this point but reaching the same conclusion) held that even though the state would regulate horse racing in the absence of industry self-regulation, the existing governing body was not exercising a public function.

[21] See e.g. *ex parte Aga Khan*, above n 20, though cf *Aston Cantlow and Wilmcote with Billesley PCC* v *Wallbank* [2003] 3 WLR 283 where it was held that a parish church council which formed part of the established Church of England, was not a public body for the purpose of the Human Rights Act 1998.

the regulation of some part of society, particularly if those being regulated have no choice in the matter if they wish to participate in the industry in question.[23] A similarly inclusive approach has been adopted by the European Union. In *Foster v British Gas plc*,[24] the European Court of Justice held that, for the purpose of implementing EU directives, public bodies include (i) those organisations which the state has charged with carrying out its functions, (ii) those under state control and (iii) those which the state has granted powers beyond those exercisable by private bodies.[25]

(3) The Informal Sector

The informal sector consists of family units. The family unit has two main functions. First, it acts as a support network for its members. Some commentators have suggested that civil society emerged as a natural extension of this network.[26] The family unit also plays the role of consumer in the private market, responding to the production of goods and services by purchasing those products which offer them the maximum utility at the lowest price.

(4) The Black Market

The black market consists of institutions which, like the private sector, operate to generate profits for their owners, but, unlike the private sector, operate outside the law. The sector includes organisations which engage in activities which by their nature are illegal such as mafia-type institutions, drug dealers and arms smugglers, and also those whose otherwise lawful activities are carried out in an illegal manner – for example practising a profession without a licence.[27]

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[22] See e.g. *ex parte Football League Ltd*, above n 19, where it was noted that the Football Association was acknowledged in the Football Spectators Act 1989.
[23] See e.g. *ex parte Datafin*, above n 20, where it was held that the Panel on Takeovers and Mergers had such a monopoly.
[24] [1990] 1 QB 405; applied by the House of Lords in [1991] 2 AC 306.
[25] See further below Ch 5 at 163 - 167.
[26] See e.g. Peachey, P., '"The Family": Obstacle or Embryo of Civil Society' in McLean, G., (ed.), *Civil Society and Social Reconstruction* (Washington, Council for Research in Values and Philosophy, 1997).
[27] See generally Dallago, B., *The Irregular Economy* (Aldershot, Dartmouth, 1990) especially Ch 1.

(5) Civil Society

Organised civil society differs from other sectors in the fact that it has no substantive definition. Crudely speaking, the private sector is defined by the fact that its organisations are driven by the pursuit of profit, whilst the public sector is defined by the fact that its organisations are all either emanations of the state or engaged in public functions. As well as determining which of the two sectors an organisation falls into, these definitions also tell us something meaningful about the nature of the organisation in question. So, for example, we know that if *x* Ltd is a private sector organisation, then because it will be driven by profit-maximisation we can apply the microeconomic theory of the marketplace to predict how it will behave in certain situations. Similarly, if we know that the Department of *y* is a public body then we can apply the rules of public law to determine the limits of its legitimate actions. Conversely, the breadth of civil society organisations and their activities means that there is no paradigm CSO: there is no single purpose, form or mode of behaviour which captures the essence of the sector. It is therefore necessary to consider alternative means of understanding organised civil society and its operation.

C. UNPACKING CIVIL SOCIETY

(1) Legal Definition

Charitable Sector in England and Wales

One way of defining organised civil society is simply to focus on the legal definition of the sector in any given jurisdiction. This approach has the advantage of revealing a relatively 'certain and straightforward' area of society on which to focus our theory of regulation.[28] For this reason, the charitable sector in England is a 'tempting field' towards which we might direct our attention:[29] whereas civil society lacks a precise definition, the charitable sector is a clearly delineated section of society. Focusing attention upon it would therefore avoid evidential problems relating to whether a given

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[28] Salamon and Anheier, above n 5 at 30.
[29] Osborne, S., and Hems, L., 'The Economic Structure of the Charitable Sector in the United Kingdom' (1995) 24(4) *Nonprofit and Voluntary Sector Quarterly* 321 at 323.

organisation fell within the sector.[30] Furthermore, as charities have been described as the 'heart and soul'[31] and 'center of gravity' of civil society,[32] in common law jurisdictions at least, we might be forgiven for assuming that this approach would tackle the key issues of civil society regulation. Certainly this is the attitude taken by recent reform bodies in the UK and other Commonwealth jurisdictions.[33]

The charitable sector consists of those CSOs which (i) pursue, exclusively, legally charitable purposes and (ii) demonstrate that they provide a public benefit. At the time of writing,[34] charitable purposes are divided into four categories laid down by Lord Macnaghten in *Income Tax Special Purposes Commissioners v Pemsel*:[35] the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community.[36] To be charitable, purposes must also fall within the 'spirit or intendment' of the Preamble to the Statute of Charitable Uses 1601,[37] thus limiting the scope of the fourth, catch-all category so that not every purpose which benefits the community will be charitable. The list of charitable purposes contained in the Preamble is:[38]

> The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or

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[30] Registration with the Charity Commission is conclusive of charitable status: Charities Act 1993, s 4(1).
[31] Greyham Dawes, R., *Tolley's Charity Accountability and Compliance 1998 – 99* (Surrey, Tolley, 1998) at 1.2.
[32] Salamon and Anheier, above n 5 at 16 (*sic*).
[33] See e.g. Prime Minister's Strategy Unit, above n 4; Scottish Charity Law Review Commission, *Charity Scotland The report of Scottish Charity Law Review Commission* (www.charityreview.com, Scottish Charity Law Review Commission, 2001); Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (www.cdi.gov.au, Charities Definition Inquiry, 2001); Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto, Ontario Law Reform Commission, 1996). Outside the Commonwealth, see Law Society of Ireland's Law Reform Committee, *Charity Law: The case for reform* (www.lawsociety.ie, Law Society of Ireland, 2002).
[34] For details of the proposed changes to this, see below Ch 5 at 182, 193 - 194.
[35] [1891] AC 531.
[36] Above n 35 at 583, derived from Sir Samuel Romilly's classification in *Morice v Bishop of Durham* (1805) 10 Ves 522 at 531.
[37] *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455 per Lord Simonds.

> maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

To satisfy the requirement of public benefit, the purpose must confer a tangible benefit on the public of the sort capable of demonstration in a court of law,[39] and a sufficient cross-section of the public must be eligible to benefit. This varies across the four heads of charity. Charities which relieve poverty will automatically satisfy the second requirement unless limited to a class of named individuals.[40] Charities which advance education must not be limited to a class linked by 'personal nexus' such as the employees of a company[41] or the family of the founder.[42] Charities which advance religion may only be limited to a class of people if those people are in contact with the public at large.[43] Charities which pursue purposes under the fourth head must not be limited to a class linked by personal nexus[44] or to 'a class within a class',[45] for example the residents of town *x* who are also members of the religious group *y*. Additionally, in respect of charities that fall under the fourth head the burden of proof falls upon them to demonstrate public benefit; for purposes under the other three heads

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[38] Statute of Charitable Uses 1601, Preamble, as translated into modern English in Picarda, H., *The Law and Practice Relating to Charities* (London, Butterworths, 1999, 3rd ed.) at 9.
[39] *Gilmour v Coats* [1949] AC 426.
[40] *Dingle v Turner* [1972] AC 601.
[41] *Oppenheim v Tobacco Securities Trust Co. Ltd* [1951] AC 297.
[42] *Re Compton* [1945] Ch 123.
[43] See *Gilmour v Coats* [1949] AC 426 where a gift to a cloistered order of nuns failed for lack of public benefit. Cf *Neville Estates Ltd v Madden* [1962] Ch 832 where a gift to a synagogue which was not open to the public was nevertheless valid because its members 'live in this world and mix with their fellow citizens' (at 853 *per* Cross J).
[44] *Re Mead* [1981] 1 WLR 1244.
[45] *Baddeley* v *Inland Revenue Commissioners* [1955] AC 572. Cf *Re Dunlop* [1984] NI 408, which suggests that a charity may limit access if the limitation is reasonably related to its purpose.

public benefit is presumed unless proved otherwise.[46] Charities will also fail to demonstrate public benefit if they have a purpose that the courts deem political.[47]

The charitable sector is already subject to a system of regulation in the form of the Charity Commission, a non-ministerial government department with the general statutory functions of 'promoting effective use of charitable resources' and 'investigating and checking abuses'.[48] The Commission is responsible for registering as charities those CSOs which satisfy the legal definition and are not exempt from registration or classed as excepted charities by virtue of the Charities Act 1993.[49]

Limitations of legal definitions

It should be apparent that focusing on any legal definition is of limited use as a basis for our theory of regulation. First, taking the legal definition as a basis for analysis relies on the assumption that the existing legal definition is appropriate – this cannot be taken for granted, particularly as there are no existing theories of civil society regulation on which the laws could be based. English charity law, for example, is based on a statute which predates sector-based analyses of society altogether,[50] and its development has been influenced by factors which have attempted to undermine civil society. For example, the law of mortmain, which dates back to the Magna Carta in 1215,[51] prohibited certain testamentary gifts of land to charities, partly so as not to deprive the Crown of revenue and partly out of 'hatred … and contempt' for charities and their benefactors.[52] Gifts which fell foul of this were declared void and would instead vest in the testator's heir or next-of-kin. The result of this was that the caselaw

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[46] This presumption will be removed if the Charities Bill 2004 if enacted in its present form (under s 3(2)). Note also the Privy Council decision in *Attorney General of Cayman Islands v Wahr-Hansen* [2001] 1 AC 75, 82 which suggests that, under the current law, if a purpose falling under the fourth head is apparently beneficial to community then it should be presumed charitable.

[47] *Bowman* v *Secular Society Ltd* [1917] AC 406; *National Anti-Vivisection Society* v *Inland Revenue Commissioners* [1948] AC 31; *McGovern* v *Attorney General* [1982] Ch 321. See below Ch 5 at 196 - 200.

[48] Charities Act 1993, s 1(3).

[49] Charities Act 1993, s 3(1).

[50] See above at 37 - 38.

[51] The original law of mortmain restricted gifts to religious corporations; the Mortmain Act 1736 placed similar restrictions on gifts to charitable causes. The law of mortmain was repealed by virtue of Charities Act 1960, s 38(1).

[52] Jones, G., *History of the Law of Charity 1532 – 1827* (Cambridge, CUP, 1969) at 107.

developed a generous interpretation of what constituted a charitable purpose, not out of an enlightened understanding of civil society but in order to ensure that gifts to charity failed wherever possible.[53] In many cases, organisations strove to convince the courts that they were *not* charitable in order that they could receive the gift in question[54] – a stark contrast to the current position, where numerous fiscal and other benefits result from charitable status.

Focusing on a legal definition would also risk our theory of regulation being limited in its applicability to those jurisdictions which shared the legal definition. Legal definitions differ considerably across state boundaries,[55] and even those common law countries which have a definition of charity law derived from the English model vary widely. In Australia, for example, it is not sufficient for a CSO to have exclusively charitable purposes – its current activities will also be taken into account.[56] In Canada, the charitable sector is split into three sub-sectors consisting of charitable organisations, public foundations and private foundations, each with its own definition.[57] Once registered as one of these organisations, a CSO must satisfy a 'disbursement quota', by spending at least 80% of its donations each year on charitable activities,[58] if it is to retain its charitable status. In the United States, charitable organisations under s 501(c)(3) of the Internal Revenue Code include those with purposes analogous to the four heads of charity in English law, but also include specific purposes such as: reducing the burdens of government; reducing discrimination; and promoting the community.[59] Whilst these are valid charitable purposes under the English law, they are not currently recognised as discrete purposes in this way, falling instead under the fourth catch-all head.

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[53] See generally Jones, above n 52 at 107 – 108 and Ch 8.
[54] See, for example, Macnaghten J's comments on the earlier case of *Re Allsop* (1884) 1 TLR 4 in *Royal Choral Society* v *Inland Revenue Commissioners* [1942] 2 All ER 610 at 611, affirmed [1943] 2 All ER 101.
[55] For thumbnail sketches of the differences, see P. 6 and A. Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Aldershot, Dartmouth, 1995) Part 1.
[56] Australian Tax Office, *Income Tax Guide for Non-profit Organisations* (Canberra, Australian Tax Office, 2003) at 35.
[57] Income Tax Act (RSC 1985, c 1 (5th Supplement)), s 149.1(1).
[58] In addition to this 80%, private foundations must spend 100% of the income they receive from other registered charities.
[59] Internal Revenue Service, *Tax-Exempt Status for Your Organisation* (www.irs.gov, Inland Revenue Service, 2001) at 22.

Legal definitions, including the examples above, tend to focus on a specific section of civil society, thereby disregarding other CSOs with comparable organisational structures and characteristics, and which are engaged in comparable activities.[60] In addition to charities, the following organisations are considered by some to fall under the umbrella of civil society: political pressure groups,[61] mutuals,[62] religious institutions,[63] trade unions[64] and recreational societies.[65] They each display a number of the key civil society characteristics which we consider below. Focusing on the charitable sector could draw attention away from regulatory issues which might affect other CSOs but are of little concern to charities - this is particularly likely in respect of those organisations based on mutuality (such as mutuals and co-operatives) rather than philanthropy.

Furthermore, as Douglas notes, many of the distinctions between charities and various other sections of organised civil society are 'somewhat artificial and arbitrary'.[66] For example, the political activities more traditionally associated with pressure groups are 'a natural and almost inevitable extension' of certain charitable activities such as the

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[60] For further discussion of the relationship between the charitable sector and civil society, see below Ch 5 at 177 - 205.

[61] See United Nations System of National Accounts 1993, para 4.65; Douglas, J., 'Political Theories of Nonprofit Organizations' in Powell, above n 5 at 52; also referred to as 'community' organisations: Marshall, T., 'Can We Define the Voluntary Sector' in Billis, D., and Harris, M. (eds.), *Voluntary Agencies Challenges of Organisation and Management* (Basingstoke and London, MacMillan, 1996) at 53.

[62] See United Nations System of National Accounts 1993 para 4.65; Douglas in Powell, above n 5 at 51.

[63] Marshall, above n 61 at 53. Although many religious CSOs will satisfy the criteria for charitable status, some will fail to demonstrate an exclusively charitable purpose by falling outside the law's definition of a religion – namely, belief in a supreme being (*R v Registrar General, ex parte Segerdal* [1970] 2 QB 697) and reverence of that being (*Re South Place Ethical Society* [1980] 1 WLR 1565). See e.g. *Decisions of the Charity Commissioners*, 17 November 1999, where the Church of Scientology was refused charitable status partly because of the lack of 'reverence or veneration' of Scientology's supreme being (at 1; further see below Ch 5 at 195). A religious organisation may also fail to satisfy the public benefit test, for example if it can only point to spiritual, rather than tangible, public benefit (*Gilmour v Coats* [1949] AC 426); further see below Ch 3 at 83.

[64] United Nations System of National Accounts 1993, para 4.65.

[65] United Nations System of National Accounts 1993, para 4.65. Recreational CVOs will fall inside the charitable sector by virtue of the Recreational Charities Act 1958 if their activities are 'in the interests of social welfare' (s 1(1)) and they satisfy a public benefit test which allows them to limit their beneficiaries to those disadvantaged by 'youth, age, infirmity or disablement, poverty or social and economic circumstances' but otherwise requires that the benefits to open to the general public as a whole (s 1(2)).

[66] Douglas, above n 61 at 51.

provision of public goods,[67] recognised by the Charity Commission's policy decision to allow charities to undertake a limited amount of political activity so long as it is 'in furtherance of, and ancillary to, the charity's stated objects'.[68] Most importantly, for every type of charitable activity undertaken and purpose pursued, it is a moment's work to think of a parallel from the wider, non-charitable civil society.[69]

More importantly for our purposes, legal definitions tend not to be particularly illuminating with regard to issues such as the nature and characteristics of CSOs. The legal definition of the charitable sector in England reveals the types of purposes which charities may pursue and also the fact that they must provide some benefit to a cross-section of the public, but significant regulatory questions are left unanswered. What organisational forms do CSOs take?[70] How are they governed? How do they behave? What conditions enable them to thrive? If these issues are to be determined it will be necessary to look at alternative methods of defining organised civil society.

(2) Financial Definition

The United Nations System of National Accounts defines organised civil society by reference to its source of income. It suggests that the sector consists of those organisations which are funded primarily by donations, explicitly excluding any organisations which operate within the private market.[71] The justification given for this is the idea that:[72]

> the majority of NPIs [non-profit institutions] ... are likely to be non-market producers that provide goods or services to other institutional units either free or at prices or fees that are not economically significant.

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[67] Douglas, above n 61 at 51. For a discussion of public goods, see the next chapter.
[68] Charity Commission, *CC9: Political Activities and Campaigning by Charities* (London, Charity Commission, 1999), para 10. See also the 2004 version of the same document, para 23 (activity must be 'incidental or ancillary to the charity's purposes').
[69] This is a theme to which we shall return in Ch 5 at 169 - 180.
[70] In contrast to the English definition, the Canadian definition of both public and private foundations does, in fact, prescribe organisational form (foundations must either be corporations or trusts).
[71] United Nations System of National Accounts 1993, para 4.161, noted by Salamon and Anheier, above n 1 at 31.
[72] United Nations System of National Accounts 1993, para 4.161.

Focusing on funding in this way highlights one of the key characteristics of organised civil society – its voluntary nature – yet as a definition it is limited in its application. The statement fails to reflect the fact that CSOs both collectively and individually receive funding from a variety of different sources, including investment income and participation in the private market, as well as private donations. In particular, it fails to take account of CSOs' increasing reliance on contracts for service provision, which are steadily replacing state grants, in order to secure funding.[73] It is also important to bear in mind that the way in which civil society is funded will change over time[74] – for example, in the UK recent state initiatives such as Gift Aid and payroll giving have altered the landscape by increasing the levels of private donations.[75] The same is also true at an individual level – a CSO may be funded by a local authority service contract one year but be forced to rely on private donations the next.

(3) Shared Characteristics of CSOs

The inadequacies of the above attempts to define organised civil society have led a number of theorists to conclude that the most useful method of describing the sector is to focus on those shared characteristics exhibited by third sector organisations. This has been termed the 'structural / operational' definition.[76] It is useful for our purposes

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[73] Often termed the 'contract culture'. See generally: 6, P., and Kendall, J. (eds.), *The Contract Culture in Public Services* (Aldershot, Arena, 1997); Charity Commission, *CC37: Charities and Contracts* (www.charity-commission.gov.uk, Charity Commission, 2002); Deakin, N, 'What does Contracting to do Users?' in Billis and Harris, above n 61; Leat, D., 'Funding Matters' in Davis Smith *et al*, above n 1; Lewis, J., 'What Does Contracting Do To Voluntary Agencies?' in Billis and Harris above n 61; Morris, D., *Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict* (Liverpool, University of Liverpool Charity Law Unit, 1999); Morris, D., 'Charities in the contract culture: survival of the largest?' (2000) 20(3) LS 409; Morris, D., 'Paying the Piper: The "Contract Culture" as Dependency for Charities in Dunn, A. (ed), *The Voluntary Sector, the State and the Law* (Oxford, Hart, 2000); O'Regan, K., and Oster, S., 'Nonprofit and For-Profit Partnerships: Rationale and Challenges of Cross-Sector Contracting' (2000) 29(1) (Supplement) *Nonprofit and Voluntary Sector Quarterly* 120; Robinson, M., 'Privatising the Voluntary Sector: NGOs as Public Service Contractors' in Hulme, D., and Edwards, M. (eds.), *NGOs, States and Donors Too Close for Comfort* (Basingstoke and London, MacMillan, 1997); Warburton, J. and Morris, D., 'Charities and the Contract Culture' [1998] Conv 419.

[74] See generally Leat, above n 73.

[75] See generally Charities Aid Foundation, *Dimensions 2001 Online* (www.cafonline.org/research/gift_aid.cfm, CAF, 2003 web version) under 'A Decade of Gift Aid 1990 – 2000'; Charities Aid Foundation, *Payroll Giving 2001-02 Update* (www.cafonline.org/research/payroll_giving.cfm, CAF, 2003 web version).

[76] Salamon and Anheier, above n 5 at 39 – 42. See also Kendall and Knapp, above n 16 at 18.

as these qualities reveal some of the factors which facilitate optimal levels of civil society activity. Salamon and Anheier highlight four characteristics which are not all displayed by every CSO but which are nevertheless prevalent in civil society.[77] These are: (i) volunteerism, (ii) independence, (iii) organisation and (iv) non-profit distribution.

Volunteerism

The general notion that CSOs should be voluntary is, of course, reflected in the fact that the 'voluntary sector' is a common synonym for organised civil society.[78] Kendall and Knapp suggest that volunteerism is the 'essential defining characteristic' of civil society,[79] whilst Levitt suggests it is the sector's 'central functioning tool'.[80] However, the requirement that an organisation be 'voluntary' is capable of a number of different interpretations. What is usually meant is either that (i) the organisation is funded by voluntary contributions as opposed to taxes or service purchase,[81] (ii) it is reliant on volunteers rather than paid workers to carry out its activities or (iii) it is managed by volunteers.[82] In practice, the focus is often on the third interpretation. We have already noted that emphasis on voluntary contributions as a source of income is misleading,[83] due to the large number of CSOs engaged in service provision, a result of the fact that two of the key functions of civil society are the provision of public goods and the provision of intangible services.[84] Emphasis on volunteer workers is misleading because many CSOs operate in areas where it is essential to have a stable, employed workforce.[85]

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[77] Salamon and Anheier, above n 5 at 33 – 34.
[78] See above at 36.
[79] Kendall, J., and Knapp, M., 'The United Kingdom' in Salamon and Anheier, above n 5 at 272.
[80] Levitt, above n 8 at 52.
[81] See above at 48.
[82] See Kendall and Knapp, above n 1 at 18; Kendall and Knapp, above n 16 at 88; Council of Better Business Bureau's Wise Giving Alliance, *Standards in Philanthropy* (www.give.org, Better Business Bureau Wise Giving Alliance, 2002 web version) para 1a. Such donations or participation must, of course, be freely entered into as opposed to the result of coercion (Sheard, J., 'From lady bountiful to active citizen: volunteering and the voluntary sector' in Davis Smith *et al*, above n 1 at 115).
[83] See above at 48.
[84] See below Ch 3 at 61 - 81 and 88 – 89 respectively.
[85] Consider e.g. healthcare and education.

The minimum requirement in order to be viewed as legitimately 'voluntary' seems, in fact, merely to be that the organisation's board of directors must be unpaid.[86] In the US, this level of volunteerism is approved by the American Council for Voluntary International Action (InterAction), which states that directors must be 'serving without compensation',[87] and also the Council of Better Business Bureaus Wise Giving Alliance,[88] although the latter suggests that it might be acceptable for just one director to receive remuneration,[89] perhaps recognising the potential need for professional managers at the highest organisational level.

However, even this small level of volunteerism may be dispensable. In England, the trustees of a charity may legitimately receive remuneration if the organisation's governing document so authorises[90] or if the Charity Commission deems it to be 'clearly in the interests of the charity'.[91] Where a charity does remunerate its trustees there is no requirement that it must demonstrate some degree of volunteerism by another means.[92]

Independence

It is widely accepted by theorists that in order to be seen as belonging to organised civil society an institution must be self-governing and independent from the interests of the state, the private market and the informal sector.[93] This is affirmed in the

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[86] Except for out-of-pocket expenses.
[87] InterAction, *PVO Standards* (www.interaction.org, InterAction, 2002 web version) para 2.2.
[88] Council of Better Business Bureaus Wise Giving Alliance (*sic*), above n 82, para 1g.
[89] Council of Better Business Bureaus Wise Giving Alliance, above n 82, para 1g.
[90] *Re Coxen* [1948] 1 Ch 747.
[91] Charity Commission, *C11: Payment of Trustees* (London, Charity Commission, 2004), para 9. The Charity Commission's current position appears to that even where expressly authorised in the trust instrument the trustees must demonstrate that their remuneration is in the interests of the charity (para 6).
[92] See below Ch 5 at 180 - 181.
[93] Kendall and Knapp, above n 82 at 18; Kendall and Knapp in Davis Smith *et al*, above n 1 at 86; Kendall and Knapp in Salamon and Anheier, above n 1 at 269 – 271; Salamon and Anheier, above n 1 at 33 – 34; Anheier, H., 'Foundations in Europe: a Comparative Perspective' in Schluter, A., Then, V., and Walkenhorst, P. (eds.) *Foundations in Europe Society Management and Law* (London, Directory of Social Change, 2001) at 41; Scottish Charity Law Review Commission, above n 33, recommendation 2. Note also Salamon, Sokolowski and List, whose revised structural-operational definition requires CSOs to be 'private' and 'self-governing' rather than 'independent' (Salamon, L., Sokolowski, S., and List, R., *Global Civil Society: An Overview* (Baltimore, Centre for Civil Society Studies, Johns Hopkins University, 2003) at 8). Salamon *et al* use the word 'private' here in order to

standard-setting guidelines of numerous civil society umbrella bodies.[94] In practice this means that the directors of an organisation must be able to make independent decisions, and ideally an organisation will have in place some 'policy which prohibits direct and indirect conflicts of interest'.[95]

It has been stated that the 'independence … of foundations has never been seriously challenged' in the United Kingdom.[96] Certainly in the context of charities there is the safeguard that trustees are under a fiduciary duty to act solely in the best interests of the charity at all times when acting in their official capacity,[97] which is reinforced by the Charity Commission in *The Hallmarks of an Effective Charity*.[98] However, the emergence of the contract culture between CSOs and government, and other examples of interaction between the sectors, may have ramifications for the independence of civil society. This will be discussed in detail in Chapter Five.[99]

Organisation

It is generally accepted that the organisations which make up organised civil society should have a degree of formality.[100] This is acknowledged by the United Nations System of National Accounts, although this also recognises the fact that in some jurisdictions it may not be necessary for such organisations to have legal status so long as their 'existence is recognized by … society'.[101] The reason why we require formality is in part to distinguish the sector from activities carried out by the informal sector, which are often similar in character.[102] For example, members of a family unit

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distinguish civil society from the state (*ibid*); it is submitted that 'independent' is to be preferred in light of the fact that the sector is also distinguished from the private sector.

[94] See, for example: Council of Better Business Bureau's Wise Giving Alliance, above n 82, para 1a; InterAction, *PVO Standards* (www.interaction.org, InterAction, 2002 web version), para 2.3.

[95] InterAction, *PVO Standards* (www.interaction.org, InterAction, 2002 web version), para 2.3.

[96] Anheier in Schluter *et al*, above n 93 at 36.

[97] *Bray v Ford* [1896] AC 44.

[98] Charity Commission, *CC60: The Hallmarks of an Effective Charity* (London, Charity Commission, 2004), para 3.

[99] See below Ch 5 at 169 - 171.

[100] Kendall and Knapp, above n 1 at 18; Kendall and Knapp, above n 16 at 86; Kendall and Knapp, above n 79 at 268; Salamon and Anheier, above n 1 at 33.

[101] United Nations System of National Accounts 1993, para 4.56(a). For example, in England an unincorporated association, which has no legal personality, may be registered as a charity.

[102] Sheard, above n 82 at 116. See above at 40.

will usually feel some moral compulsion to provide for other members of the unit who are poorer than themselves, and any activity undertaken in pursuit of this would normally fall under the umbrella of the informal sector. If, however, the same activities were carried out by some formal organisation, such as a charity, then this would fit more easily in civil society. Clearly there is potential for overlap here - for example, if the family unit established a 'poor relations' charitable trust to provide for solely for impoverished members of one particular family unit.[103]

It is of course desirable that CSOs are not merely organised, but organised according to principles of sound management. The Council of Better Business Bureaus recommends an 'adequate governing structure',[104] whilst InterAction talks of 'organisational integrity'.[105] In the charity law context, the Charity Commission advocates that organisations be formally established with a coherent governing document,[106] display transparency[107] and generally conduct themselves in a manner 'consistent with high standards of management'.[108] Below the level of trustees, the United Nations System of National Accounts suggests that members of institutions should have equal voting rights.[109] We will discuss the standards that we might expect of CSO managers in detail below.[110]

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[103] Such a trust being the exception to the general rule in England and Wales that a charity must demonstrate that it benefits a cross-section of the public not linked by some personal nexus (*Dingle v Turner* [1972] AC 601). The orthodox position is that a poor relations trust will be charitable unless it is limited to specified persons, such as the settlor's next of kin (*Re Scarisbrick* [1951] Ch 622) or named individuals, in which case it will be a private trust. In *Re Segelman* [1996] Ch 171, Chadwick J upheld as charitable a trust under which named relations could benefit; however, it is unlikely that a similar outcome would be reached today by a higher court (see Luxton, P., *The Law of Charities* (Oxford, OUP, 2001) at 175).

[104] Council of Better Business Bureaus, *Standards for Charitable Solicitations* (www.give.org, Better Business Bureau Wise Giving Alliance, 2002 web version), para E1.

[105] InterAction, *PVO Standards* (www.interaction.org, InterAction, 2002 web version), para 3.

[106] Charity Commission, above n 98, para a.

[107] *Ibid*, para g.

[108] *Ibid*, para c.

[109] United Nations System of National Accounts 1993, para 4.56(b).

[110] See generally below Ch 8.

Non-profit distribution

The final shared characteristic of CSOs is the fact that they do not distribute profits amongst their members.[111] Some organisations will by their nature operate at a loss or simply hope to break even: one of the key functions of civil society that we shall examine in the next chapter is the provision of public goods, which are goods that the private market fails to supply for the very reason that doing so will not result in profit.[112] Some CSOs, conversely, do in fact make a profit, but what distinguishes them from the private sector is the idea that they should not distribute those profits to their members,[113] but instead plough them back into funding their activities. The characteristic of non-distribution of profit is a pre-requisite of the contract failure theory of civil society which we will consider in the following chapter.[114]

One issue of potential regulatory concern which arises from an organisation making a profit is the extent to which it should be allowed to accumulate reserves. CSOs which are heavily reliant on private donations may be tempted to do this as a means of securing their long-term future and mitigating the unpredictable nature of such funding. However, there has been a certain amount of media criticism of this approach in recent years, particularly in relation to relatively wealthy charities such as the Guide Dogs for the Blind Association and the Royal National Lifeboat Institution.[115]

If CSOs must not distribute profits then mutual societies and cooperatives must by their nature be excluded from our definition of civil society. However, this 'does not accord well with … popular notions of the sector'.[116] One of organised civil society's

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[111] Salamon and Anheier, above n 1 at 33; United Nations System of National Accounts 1993, para 4.56(c); Kendall and Knapp, above n 1 at 18; Kendall and Knapp, above n 16 at 87; Kendall and Knapp, above n 79 at 271; Anheier, above n 93 at 41; Scottish Charity Law Review Commission, above n 93, recommendation 2.

[112] Of course, it is technically possible, although unlikely, that donations could exceed the cost of public goods provision.

[113] United Nations System of National Accounts 1993, para 4.56(d).

[114] See below Ch 3 at 65 – 70, 88 – 90, 92 - 93.

[115] In 1994 the Guide Dogs for the Blind Association was reported as having between £120m and £160m in reserves (*The* Guardian, 17 October 1994), whilst in 2002 the RNLI had £200m 'sitting comfortably at the bottom of its balance sheet' (*The Guardian,* 10 April 2002). See generally: Mitchell, C., 'Saving for a Rainy Day: Charity Reserves' (2002) 8 CL and PR 35; Charity Commission, *RS3: Charity Reserves* (www.charity-commission.gov.uk, Charity Commission, 2003). See below Ch 4 at 139 - 140.

[116] Steingberg, R., 'Overall evaluations of economic theories' (1997) 8 *Voluntas* 179 at 181.

functions is the facilitation of public participation in democracy to counteract the 'dirigisme of the state',[117] and cooperatives and mutuals can play an important role here.[118] Mutuals and cooperatives which display the other key characteristics of organisation, independence and volunteerism are, for this reason, included in our model of civil society. However, distinctions will be drawn where appropriate between these organisations and philanthropic CSOs.

D. CONCLUSION

This chapter has sought to describe the constitution of organised civil society, by drawing comparisons with other sectors of society and highlighting the four key characteristics of volunteerism, independence, organisation and non-profit distribution which CSOs usually, though not always, exhibit. We have also introduced some of the reasons why it is not satisfactory to focus on the charitable sector when devising a regulation theory. We will return to these themes in Chapter Five, where we consider in greater detail the relationship between the three main sectors and also the relationship between the charitable sector in England and wider civil society.

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[117] Knapp, M., Robertson, E., and Thomason, C., 'Public Money, Voluntary Action' in Anheier, H., and Seibel, W. (eds.), *The Third Sector Comparative Studies of Nonprofit Organisation* (Berlin and New York, Walter de Gruyter, 1990) at 209.
[118] See below Ch 3 at 101 - 104.

CHAPTER 3

Functions of Civil Society

A. INTRODUCTION

The previous chapter detailed the core characteristics shared by civil society organisations. This chapter follows on from this to consider the social functions that are performed by organised civil society. Understanding the functions of the sector is necessary in order that we can proceed (i) to develop an appropriate and effective theory of regulation targeted specifically at organised civil society, and (ii) to evaluate regulatory models and strategies with a view to putting this theory into practice.

There is no single over-arching purpose of organised civil society – as Badelt has noted, it is 'too heterogeneous to be explained just by one specific theoretical approach'.[1] Some commentators have suggested that its role is simply to accomplish those residual tasks which the state and the marketplace are unable to perform – Weisbrod, for example, suggests that society first looks to the public and private sectors and only when they fall short do we 'resort' to CSOs.[2] Others put forward vague and platitudinous purposes such as correcting 'the ills of society',[3] or 'stitching a torn social safety net',[4] which tell us very little about the activities that CSOs pursue on a routine basis. In fact, organised civil society goes much further than the routine filling in of gaps. Its functions can be broadly categorised as follows: (i) market support; (ii) provision of public goods; (iii) delivery of complex services; (iv) redistribution of wealth; (v) facilitation of political action; (vi) provision of cultural services; (vii) facilitation of self-determination and finally (viii) facilitation of entrepreneurship. The first six of these are geared towards the production of end

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[1] Badelt, C., 'Entrepreneurship theories of the non-profit sector' (1997) 8 *Voluntas* 162 at 169.
[2] Weisbrod, B., 'Toward a Theory of the Voluntary Sector in a Three-Sector Economy' in Rose-Ackerman, S. (ed.), *The Economics of Nonprofit Institutions: Studies in Structure and Policy* (New York, OUP, 1986) at 26.
[3] Douglas, J., *Why Charity? The Case for a Third Sector* (Beverly Hills and London, Sage, 1983) at 14.
[4] Voluntary Sector Roundtable Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (www.vsr-trsb.net, Voluntary Sector Roundtable, 1999) at 13.

products, whereas the last two concern the processes by which these end products are achieved.

It is important to note two things about these categories. First, they represent a distillation of the various economic and sociological arguments that seek to explain the presence of organised civil society. Although there are similarities between certain functions – in particular, several turn on the notion that CSOs are more trustworthy than private firms – each is, in certain key aspects,[5] theoretically distinct, as we will attempt to demonstrate in the following discussion. However, the nature of organised civil society is such that there are no clear distinctions between these functions in practice. Much CSO activity will straddle two or more functions – for example, public goods may be provided by an entrepreneur through political action.

B. MARKET SUPPORT

A significant number of CSOs are engaged in activities that provide the private sector with the appropriate conditions and resources for it to operate effectively. Gassler refers to these as 'extra-market activities'.[6] However, this term is unsatisfactory as much of the rest of civil society activity also operates outside the market. What we are concerned with here are those activities that are concerned with enabling the market to operate effectively, as opposed to those activities which fulfil social functions that are not provided by the market, which we shall examine later in this chapter. These market support functions can be split into two categories – those that provide the conditions which are necessary for the market to operate ('systemic activities'),[7] and those that operate to shape the environment in which the market functions ('environmental activities').[8]

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[5] However, there is some theoretical overlap: e.g. the advocacy of minority rights, which we discuss in the context of the facilitation of political action, may also be explained by reference to the public good function (see below at 92 – 93).

[6] See generally Gassler, R., *The Economics of Nonprofit Enterprise: A Study in Applied Economics* (Lanham, Maryland, University Press of America, 1986); Gassler, R., 'Nonprofit and Voluntary Sector Economics: A Critical Survey' (1990) 19 *Nonprofit and Voluntary Sector Quarterly* 137.

[7] Gassler (1986), above n 6 at 22; Gassler (1990), above n 6 at 141.

[8] Gassler (1986), above n 6 at 20; Gassler (1990), above n 6 at 141.

(1) Systemic activities

Redistribution of property rights

The distribution of property rights is usually organised either by the market or the state. The market can achieve redistribution through individual bargaining – for example, by reaching an agreement as to whether *x* has the right to carry on an activity which interferes with *y* or whether *y* has the right to be free from interference by *x*'s activity. The state can do this by passing laws which allocate rights – for example, by passing a law stating that *y* has the right to be free from interference and *x* must pay *y* compensation if he breaks this rule.[9] Alternatively, the market and the state can operate in tandem, with the state passing laws which facilitate bargaining between the parties by reducing the costs of that bargaining[10] – for example, by developing a law of contract. Organised civil society can assist this process by informing state activity – as Gassler notes, the Thirteenth Amendment to the United States Constitution, which redistributed property rights by abolishing slavery, was, in part, a result of campaigning by CSOs which changed attitudes towards slavery in the US.[11] This role is not merely historical; contemporary human rights organisations, such as Amnesty International and the American Anti-Slavery Group, are engaged in similar campaigns on a global level in the present day, whilst Anti-Slavery International was registered as a charity in England in 1995.[12]

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[9] For examples of state allocation of property rights and the resolution of conflicting interests, see *Miller v Jackson* [1977] QB 966 and *Kennaway v Thompson* [1981] QB 88 which arrive at differing allocations of rights in the context of tortious liability. Note also *Dennis* v *Ministry of Defence* [2003] EWHC 793, where, in the context of the right to privacy and a family life under Human Rights Act 1998, the public interest in the flying of military aircraft outweighed the private nuisance caused by the noise of the aircraft.

[10] Referred to as 'transaction costs'. According to the Coase Theorem, where transaction costs are zero, the market will be able to achieve an economically efficient distribution of property rights (see generally Coase, R., 'The Problem of Social Cost' (1960) 3 J Law and Econ 1). On transaction costs in relation to the use of CSOs themselves, rather than private firms, see generally Krashinsky, M., 'Transaction Costs and a Theory of the Nonprofit Organization' in Rose-Ackerman, above n 2.

[11] Gassler (1986), above n 6 at 22.

[12] Charity No. 1049160. However, Luxton suggests that charitable status was only granted because of the organisation's long tradition, having its origins in the Anti-Slavery Society founded in 1839 (Luxton, P., *The Law of Charities* (Oxford, OUP, 2001) at 226); certainly it is difficult to see how the object of eliminating all forms of slavery and forced labour would sidestep the prohibition on political charitable purposes (see below Ch 5 at 196 – 200).

Reduction of transaction costs

Markets are able to operate more efficiently when transactions costs are minimised.[13] The introduction by the state of standard legal mechanisms such as the contract can go some way towards minimising these costs. For example, every time *x* and *y* decide to deal with each other, they do not have to start from first principles and draw up a new vehicle to carry out their endeavour. Instead, they follow the rules of contract law:[14] one makes an invitation to treat to the other which, following bargaining, leads to an offer, which is either accepted, rejected or followed by a counter-offer and further bargaining until an agreement is reached. The parties do not have to invest resources in determining the consequences of their actions at each stage of this bargaining process,[15] as the law of contract has already determined this for them. Contract law can also determine the consequences if the agreement is carried out successfully, breached by one of the parties, or frustrated by actions outside either party's control.

However, transaction costs are only kept at a minimum if the parties to a contract 'play the game' and adhere to the legal rules. The costs of individual transactions will rise if it is necessary to invoke the authority of the courts as a matter of course in order to resolve disputes. Gassler suggests that some CSOs can help to minimise this problem by encouraging members of society to follow the law,[16] by means of appropriate moral education or religious instruction. However, this role need not be limited to educational and religious institutions – any CSOs which participate in activities which engender respect towards others or encourage community spirit would seem likely to have a similar effect.[17] The somewhat nebulous nature of this function of organised civil society, along with the fact that it would be extremely difficult to measure the effects of moral education or religious instruction, mean that it is not easy to adduce evidence which either supports or refutes the idea that this function is carried out in

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[13] See above n 10.
[14] Cf Beale, H., and Dugdale, A., 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *British Journal of Law and Society* 45 on the role of non-contractual business practices.
[15] Although they may decide to obtain legal advice.
[16] Gassler (1986), above n 6 at 24 - 25.
[17] On which see below at 102 - 103.

practice, though it seems plausible. However, this is unlikely to be the sole, or even main, purpose of any area of civil society activity.[18]

Market failure: resolution of information deficits

We argue below that one of the most important functions carried out by organised civil society is the provision of goods and services which the market fails to provide.[19] One of the traditional reasons for market failure is that consumers are unable to make informed choices about competing products or suppliers because of a lack of available information on which to base their decision.[20] This typically occurs where the nature of a particular product means it cannot be adequately evaluated until it has been purchased. A box of breakfast cereal, for example, could be evaluated by comparing data that is freely available – such as its price, weight and the presence or absence of a free novelty toy – with that of competing brands. The state could increase the data available to consumers by regulating so that the disclosure of nutritional information is compulsory,[21] enabling a more informed choice. On the other hand, a product which is not so amenable to measurement in this fashion, such as a massage, cannot easily be assessed without actually trying both the product itself and a selection of the market rivals.

Information deficits such as this can be resolved in numerous ways – in the case of the massage, state regulation could require all masseurs to reach a certain professional standard before they are allowed to practise. However, whilst this would ensure that all masseurs operated at an acceptable level of skill, it would still leave consumers unable to make a rational choice, as the abilities of each practitioner, and the services offered by them, could still vary widely. The market itself could correct some of the deficit by providing prospective consumers with an indication of the levels of

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[18] Although note that under the Charities Bill 2004, s 2(2)(e) the advancement of citizenship or community advancement will become a charitable purpose in its own right.
[19] See below at 61 - 88.
[20] See generally Ogus, A., *Regulation: Legal form and economic theory* (Oxford, Clarendon Press, 1994) at 38 – 41; Breyer, S., 'Typical Justifications for Regulation' in Baldwin, R., Scott, C., and Hood, C. (eds.), *A Reader on Regulation* (Oxford, OUP, 1998) at 72 – 74; Baldwin, R., and Cave, M., *Understanding Regulation Theory, Strategy and Practice* (Oxford, OUP, 1999) at 12; Cooter, R., and Ulen, T., *Law and Economics* (Reading, Adison Wesley Longman, 2000, 3rd ed.) at 43.

satisfaction experienced by previous consumers. However, this is also unsatisfactory as there is strong incentive for service providers to give an inaccurate picture of customer satisfaction by directing prospective consumers only towards favourable reviews. In this situation, CSOs frequently adopt the role of 'consumer watchdog'[22] and provide a vehicle for the dissemination of the product experiences of previous consumers to facilitate informed decision-making – the importance of this particular role of organised civil society is evidenced by the Charity Commission's recognition of the charitable status of the Consumers' Association as a research institution.[23] Alternatively, CSOs can also operate to encourage firms to take it upon themselves to increase the quantity and quality of information available to consumers.[24]

(2) Environmental activities

Provision of resources

The most prevalent extra-market activity carried out by organised civil society is the provision of resources – raw materials which the market can utilise for its own ends. This activity is typically undertaken by educational CSOs. We can categorise provision according to the type of resources provided. First, CSOs provide technological resources, such as the 'basic research' which is undertaken by universities and which the market can develop and exploit.[25] Second, CSOs supply the human resources necessary for industries to operate, providing education and training which produces future workers. Often, the supply of technological and human resources will be among the main purposes of CSOs engaged in this kind of activity,

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[21] See generally Baldwin and Cave, above n 20 at 49 – 50; Ogus, above n 20 at 121 – 149.
[22] Gassler (1986), above n 6 at 24; Gassler (1990) above n 6 at 142.
[23] Charity Commission, *Central Register of Charities*, (www.charity-commission.gov.uk, Charity Commission, 2003 web version), Charity No. 296072.
[24] See e.g. the Institute of Business Ethics, Charity No. 1084014, which aims to help firms to 'build relationships of trust with their customers … through the exchange and discussion of experience on issues relating to the conduct of business' (Institute of Business Ethics, *IBE Homepage* (www.ibe.org.uk, IBE, 2003 web version) under 'Welcome').
[25] Gassler (1986), above n 6 at 20.

and these will typically be organisations such as schools and universities. However, education and training need not be limited to traditional schooling.[26]

Shaping of consumer preferences

The moulding of consumer preferences and attitudes towards product utility may result from the instruction provided by educational and religious institutions.[27] As with the role of CSOs in relation to the reduction of transaction costs discussed above, it is unlikely that this is anything more than an incidental result of other civil society activities.

C. PROVISION OF PUBLIC GOODS

The bulk of civil society theory to date focuses on the role of CSOs as providers of 'public goods'. Empirical work conducted by James and Rose-Ackerman in the 1980s confirmed that the bulk of civil society presence is 'generally consistent with theories that stress … public goods' provision,[28] and this presence is acknowledged in a number of official papers.[29] Four theories have been used to explain this – Weisbrod's theory of market failure,[30] Hansmann's theory of contract failure,[31] Levitt's theory of government failure,[32] and, more recently, Salamon's theory of voluntary failure.[33]

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[26] This is recognised by the current definition of education under the second head of charity – see, for example: *Townley v Bedwell* (1801) 6 Ves 194 (botanical garden held to be charitable); *Re Lopes* [1931] 2 Ch 130 (Zoological Society held to be charitable); *Re Dupree's Deed Trusts* [1945] Ch 16 (trust for the promotion of chess upheld as charitable).

[27] Gassler (1986), above n 6 at 20.

[28] James, E. and Rose-Ackerman, S., *The Nonprofit Enterprise in Market Economies* (Chur, Switzerland and New York, Harwood Academic Publishers, 1986) at 60.

[29] See further: Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto, Ontario Law Reform Commission, 1996) chapter nine at 10 – 11; Prime Minister's Strategy Unit, above n 161 para 3.1.

[30] Weisbrod, above n 2.

[31] Hansmann, H., 'Economic Theories of Nonprofit Organization' in Powell, W. (ed.), *The Nonprofit Sector A Research Handbook* (New Haven and London, Yale University Press, 1987); Hansmann, H., 'The Role of Nonprofit Enterprise' in Rose-Ackerman (1986) above n 2.

[32] Levitt, T., *The Third Sector: New Tactics for a Responsive Society* (New York, AMACOM, 1973).

[33] Salamon, L., 'Of Market Failure, Voluntary Failure, and Third-Party Government: Towards a Theory of Government-Nonprofit Relations in the Modern Welfare State' in Ostrander, S. and Langton, S. (eds.), *Shifting the Debate: public/private sector relations in the modern welfare state* (New Brunswick, Transaction, 1987) (hereafter Salamon (1987a)); Salamon, L.,

Each of these answers the question of why CSOs are able to provide public goods from a different angle, and only together do they provide a complete picture. They all essentially suggest two things: first, that in certain circumstances CSOs will be the only appropriate vehicles for the supply of certain products; second, that in certain other circumstances CSOs, whilst not the only option, will be the most appropriate vehicles for the supply of certain products. The theories are useful from a regulatory perspective as they highlight (i) the characteristics that make CSOs successful public goods providers and (ii) the reasons why the public and private sectors are less successful. This enables us to shape a regulatory strategy that (i) encourages these characteristics and (ii) prevents the problems which affect the public and private sectors from infecting organised civil society.

(1) Concept of public goods

Public goods (sometimes referred to as 'collective goods')[34] are all those goods and services which are nonrivalous and nonexcludable. By nonrivalous, we mean two things: first, no matter how many consumers use the product, it remains available to others,[35] and second, it costs the producer the same amount to provide the product for many consumers as it does to provide it for a few.[36] The 'oft-cited' archetypal nonrivalous product is national security.[37] If a state defends its territory by erecting a fortified wall around its border then the benefits are available to anyone who chooses to set foot inside, regardless of how many other citizens also gain the benefit. Similarly, the cost of providing the wall will not increase if more people take the benefit, nor will it decrease if fewer people take the benefit. By nonexcludable, we mean that whilst the product is being provided it is impossible, or at least so impractical as to make it effectively impossible in practice,[38] to prevent people from

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'Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations' in Powell, above n 31 (hereafter Salamon (1987b)).

[34] Olson, M., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Massachusetts and London, Harvard University Press, 1971) at 14 - 16.

[35] Cooter and Ulen, above n 20 at 42; Olson, above n 34 at 15.

[36] Hanmann (1987), above n 31 at 29.

[37] Ogus, above n 20 at 33.

[38] Goods which are nonexcludable in this sense are sometimes referred to as 'impure' public goods.

taking the benefit even if they do not pay.[39] The archetypal nonexcludable product is clean air – if the effects of pollution were to be reversed in a particular locality, it would not be possible to prevent residents who refused to contribute to the cost from breathing in the clean air.

(2) Weisbrod's theory of market failure[40]

According to Olson, private organisations will not normally choose to provide public goods on any significant scale.[41] This is because there is a strong temptation for the rational consumer, driven by the desire to maximise his utility, to 'free-ride'[42] – that is, to take the benefit but leave others to bear the cost. This is possible because (i) so long as at least one other consumer is paying for the provision of the public good then the benefit will be *prima facie* available to all consumers, because consumption is nonrivalous; and (ii) access to the good cannot be limited depending upon whether or not a consumer makes a financial contribution, because consumption is nonexcludable. This is particularly a problem where the number of consumers is large – which will typically be the case: archetypal public goods are national security and the environment – as the consumer will be able to ease his conscience with the thought that his individual contribution would be relatively insignificant.

A number of possible scenarios result from this. First, if we assume that all consumers are economically rational, everyone will choose to free-ride in relation to a given public good. This means that no private organisation will supply the good, as it will not be able to recoup its costs, let alone make a profit. On the other hand, we can recognise that not all consumers are motivated solely by economic factors, and that there will be a number of good souls who are willing to pay for the good. There are still problems, however. Many of those who willing to pay are likely to be discouraged by the fear that they will be in the minority and will have to bear the

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[39] Cooter and Ulen, above n 34 at 42; Olson, above n 34 at 14; Hansmann (1987), above n 31 at 29.
[40] See generally Weisbrod, above n 2; also Salamon (1987b), above n 33 at 109; Levitt above n 32 at 49.
[41] Olson, above n 34.
[42] Olson, above n 34 at 10.

burden of all those who choose to free-ride.[43] Hence, they ultimately choose to free-ride as well. This is compounded by the fact that for each consumer who chooses not to contribute, the cost to the remaining consumers will increase. Thus the greater the number who choose to free-ride, the greater the incentive will be to follow suit. The few who defiantly remain willing to pay are likely to be faced with a prohibitively high price in order to compensate for the rest. The end result is that consumers are either unwilling to pay or willing to pay but unable to do so. Consequently, there is no reason for a private organisation to offer to produce any public goods, as their production is unlikely to yield any profit. Those firms which do decide to take the risk and provide public goods are likely to be insignificant.

The result of this is that public goods provision will instead be provided by the state, which is able to avoid the problem of free-riding by coercing citizens into contributing towards the cost – typically through taxation. However, in a democracy, majority government will be unable to provide public goods which satisfy the preferences of minority groups. Weisbrod's theory suggests that the only practical option for these groups, short of migrating to another state whose public goods provision suits them,[44] is to turn to organised civil society.[45] Because CSOs are not constrained by the need to maximise profit for their owners, as they are typically non-profit distributing,[46] they are able to pursue an activity *for its own sake*. This means they can safely commit themselves to the production of a public good, as they are sheltered from the profit-related difficulties which result from nonrivalous consumption and nonexcludability. Furthermore, Olson argues that free-riding is less likely to occur when we are concerned with a relatively small group of people, because individual contributions will now be proportionately larger so that it *does* matter if one member of the group chooses not to contribute.[47] The consequence of all this is that small groups of consumers who desire a particular public good will in theory join together and form a CSO in order that they might have a vehicle through which they can pursue this.

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[43] Douglas, J., 'Political Theories of Nonprofit Organisations' in Powell, above n 31 at 45.
[44] Weisbrod, above n 2 at 26 – 27.
[45] Weisbrod, above n 2 at 27.
[46] Non-profit distribution is one of the key characteristics of organised civil society discussed above in Ch 2 at 47 - 48.
[47] Olson, above n 41, ch 2.

Alternatively, they may associate themselves with an existing CSO which shares their desire.

Weisbrod's theory is an important step in understanding organised civil society presence. However, it does not actually focus on civil society; rather, it is primarily concerned with the market's inability to produce any public goods, and with the state's inability to produce levels of public goods which satisfy all consumers. As a consequence of this, whilst Weisbrod's theory explains why the private and public sectors cannot provide satisfactory levels of public goods, it does not consider in any detail why CSOs are a viable choice as providers of public goods.

The second limitation of the theory of market failure is that it fails to address fully why the market does not provide a significant level of public goods.[48] The free-riding problem, upon which the theory hinges, implies that the market will not be able to provide public goods on a large scale. However, the theory concludes with the idea that consumers will band together in small groups with others who share the same preferences. Weisbrod does not explain why at this low level consumers cannot turn to (or establish their own) private enterprises instead of CSOs to provide public goods.[49]

(3) Hansmann's theory of contract failure[50]

Hansmann's theory of contract failure answers this question and explains why CSOs, rather than the market, dominate small-scale public goods provision. The basic premise is that when consumers group together and fund public goods, they will be 'incapable of accurately evaluating' those goods,[51] because of a lack of product information. When faced with a choice of potential service providers, consumers are therefore inclined to select the organisation which they consider most trustworthy, in

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[48] Noted by Badelt, C., 'Institutional Choice and the Nonprofit Sector' in Anheier and Seibel, above n 34 at 56.

[49] On which, see below at 75.

[50] Also referred to as 'trust theory'. See generally Hansmann (1986), above n 31; Hansmann (1987), above n 31. See also: Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto, Ontario Law Reform Commission, 1996) chapter 9 at 12; Rose-Ackerman, S., 'Altruism, ideological entrepreneurs and the non-profit firm' (1997) 8 *Voluntas* 120 at 124; Salamon (1987b) above n 33 at 109; Easley, D. and O'Hara, M., 'Optimal Nonprofit Firms' in Rose-Ackerman, above n 2 at 88.

[51] Hansmann (1986), above n 31 at 61.

order to minimise the risk that their public goods will be compromised in some way. Because CSOs are not susceptible to the perceived corrupting influence of profit, they are generally seen as more reliable and responsible than their private sector counterparts.[52]

The situations in which information asymmetry between producer and consumer is problematic are those in which it is either impossible or highly impractical for the consumer to evaluate the quality of the goods in question. In the private goods context, the issue will usually be whether evaluation is possible before purchase; post-purchase, most information deficits will be resolved, as the consumer will now have product experience.[53] In the public goods context, however, the problem is much bigger: as well as the difficulty of pre-purchase evaluation, there is also the fact that consumers will typically not be able to judge the quality of the goods even after they have been supplied. There are two main reasons for this. First, because the beneficiaries extend far beyond those who are financing the good, it will be very difficult to obtain an accurate picture of the quality of the good overall.[54] This is compounded by the fact that the beneficiaries will not all have the same public goods preferences, so that even if it were possible for a representative sample to provide feedback it would be hard to eliminate the resulting bias. Second, the nature of many public goods means that some or all of their benefits will be either (i) incompatible with evaluation, because we lack the appropriate technology and tools of assessment, or (ii) not apparent until some point in the future – for example, this will be the case with many environmental public goods such as pollution control.

The result of this information asymmetry is that consumers believe that private enterprises cannot be trusted not to 'raise prices and cut quality',[55] or even to 'renege on promised service' altogether,[56] in order to maximise their profits. When

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[52] Hansmann (1987), above n 31 at 29.
[53] Of course, this will not always be the case: some product qualities – for example, durability – must be assessed over a prolonged period of time. For further on information deficits in the context of private goods, see above at 52 - 54 and below at 88 - 89.
[54] It may be *technically* possible for all the beneficiaries to come together and evaluate the good, but the cost of doing so renders this impractical (Krashinsky, above n 10 at 117).
[55] Hansmann (1986), above n 31 at 62.
[56] Young, D., 'Alternative Models of Government-Nonprofit Sector Relations: Theoretical and International Perspectives' (2000) 29(1) *Nonprofit and Voluntary Sector Quarterly* 149 at 154.

information asymmetries arise in the context of private goods provision, there are several regulatory strategies which can be employed to resolve them and re-engender trust in the market. Contract failure theory assumes the first choice will be for the market to resolve the deficit by itself, with consumers agreeing parameters of quality when contracting with the service provider, and then seeking damages if this agreement is breached. Alternatively, consumers could insure against the service providers' failure to maintain adequate standards.[57] Another option would be state intervention – government could restrict production to qualified or licensed service providers,[58] or require mandatory disclosure of information about the goods.[59] We have also noted earlier the role which CSOs can play in distributing product information to consumers.[60] With the possible exception of licensing,[61] the effectiveness of all these methods of remedying information asymmetry relies at least in part on post-purchase monitoring: without this, it would be difficult (i) to determine whether there has been a breach of contract, (ii) to ensure the accuracy of disclosed information or (iii) to provide proof of failure to meet standards to an insurer. Because the nature of public goods limits post-purchase evaluation, these safeguards are unlikely to be an effective solution to the problem of lack of trust in this context. The best option for consumers is to employ organisations which are not affected by the temptation to maximise profit. Consumers will therefore be attracted to CSOs because although they are capable of lowering production standards in the manner described above, their non-profit character means that in theory they have no incentive to do so.[62] The alternative would be to contract with the owners of a private enterprise not to distribute more than a certain amount of profit. This would essentially mean converting the enterprise into a nonprofit organisation,[63] and as this would increase

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[57] See Krashinsky, above n 10 at 117.
[58] See Krashinsky, above n 10 at 117.
[59] See generally Baldwin and Cave, above n 20 at 49 – 50; Ogus, above n 20 at 121 – 149.
[60] See above at 52 - 54.
[61] Licensing works instead by ensuring that only trustworthy enterprises are permitted to produce goods in the first place.
[62] Hansmann (1986), above n 31 at 62.
[63] Hansmann (1986), above n 31 at 67.

transaction costs, it will be in the interests of consumers to turn to civil society instead.[64]

As with market failure theory, Hansmann's thesis assumes that organised civil society is 'second best' to the market,[65] and consequently fails to consider in any detail how suitable CSOs are to public goods provision beyond their non-profit distribution. The significance of the theory has also been challenged recently by Ortmann and Schlesinger,[66] who highlight three phenomena which could negate any advantage organised civil society holds over the market in terms of trust: reputational ubiquity, incentive compatibility and sector adulteration.

Challenges to contract failure theory

Reputational ubiquity

Ortmann and Schlesinger have argued that by virtue of 'repeat encounters and reasonable information flows',[67] the market will be able foster consumer trust over a period of time and thus remove the need to utilise CSOs. Certainly, it is easy to imagine three situations in particular when this may be true. First, a private enterprise may be trusted where the members of the group financing the public good are able to evaluate the end product themselves, because the benefits are readily apparent - for example, the construction of a flood barrier. Where this is not the case, private enterprise may still be trusted to provide public goods if it has already established a reputation as a trustworthy provider of private goods, especially if there is a natural connection between the public and private goods. Alternatively, a firm may publicly demonstrate a 'social conscience' to show it is not motivated wholly by profit, for example by contributing financially or otherwise to a CSO or local community project.

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[64] Hansmann (1986), above n 31 at 68. This is an example of the clear overlap between the different functions of organised civil society: its role as a tool to reduce transaction costs is noted above at 51 - 52.
[65] Hansmann (1986), above n 31 at 62.
[66] Ortmann, A. and Schlesinger, M., 'Trust, repute and the role of non-profit enterprise' (1997) 8 *Voluntas* 97.
[67] *Ibid* at 101

Despite these examples, it is unlikely that the reputational ubiquity argument is a serious threat to Hansmann's theory. As we have already noted, most public goods will *not* be capable of meaningful evaluation by those who fund them, regardless of the number of repeat encounters; Ortmann and Schlesinger recognise that in this situation the market is not the most appropriate vehicle.[68] It is also unclear how far consumers will be willing to trust private enterprise to provide goods in an unsupervised fashion solely on the basis of its trustworthiness in a supervised environment. Furthermore, reputations are built over a sustained period of time, suggesting that CSOs should retain their edge with respect to novel public goods.[69]

Incentive compatibility

Ortmann and Schlesinger's second challenge centres on the idea that profit-maximisation is not the sole threat to quality of service,[70] and that there are several other temptations which may be just as distracting to CSOs as the market. Resources may be diverted from service provision by inflating administration costs unnecessarily in order to increase salaries[71] or to provide staff with other benefits such as company cars or extravagant office facilities. This is likely to be less of a problem in those areas of organised civil society which are viewed as prestigious – e.g. universities and research institutes – as prestige itself may operate as 'compensation' for forgoing pecuniary benefits.[72]

It is also not clear that CSOs will in fact always be immune from profit-maximisation. As James notes, a CSO with a portfolio of different activities may focus on those which yield a profit in order to subsidise those which operate at a loss,[73] thereby introducing profit-maximisation as an operational consideration.

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[68] *Ibid* at 102.
[69] *Ibid* at 104.
[70] *Ibid* at 102.
[71] We have already noted that, despite the supposed voluntary nature of organised civil society, it is commonplace for CSOs to employ staff and remunerate trustees (see above Ch 2 at 49 - 50).
[72] Ortmann and Schlesinger, above n 66 at 105. See also DiMaggio, P., 'Nonprofit Organizations in the Production and Distribution of Culture' in Powell, above n 31 at 204.
[73] James, E., 'How Nonprofits Grow: A Model' in Rose-Ackerman, above n 2 at 185 – 195.

Adulteration

The third challenge to contract failure theory stems from the fact that the more trustworthy organised civil society is perceived to be, the more resources it will attract, thereby increasing the incentive for abuse. At least in theory, the paradox then occurs that those CSOs that are most trusted initially are most likely to have this 'eroded by subsequent violations'.[74]

(4) Levitt's theory of government failure[75]

Levitt's theory of government failure develops the second strand of market failure theory and explains why the state will not always be an appropriate public goods provider. Traditional microeconomic theory suggests that, in light of the market's inability to provide public goods,[76] it is the role of the state to supply them. The state is readily able to overcome the free-riding problem as it has the power to coerce consumers into contributing – typically, through taxation. There is certainly clear evidence that this is happens in practice – national security, for example, will almost invariably be co-ordinated by the state even if individual defence roles are contracted-out. In a democracy, however, the state will not be able to provide public goods at a level which satisfies the utility of all its citizens. This is an inevitable consequence of the fact that the government is controlled by the majority and therefore only those goods approved by the majority will be provided. In any heterogeneous society, there will be innumerable minority groups who desire both (i) public goods which are not supplied by the government and (ii) different levels of those public goods which are being provided at present.[77] Additionally, public goods provision may be targeted at resolving a problem which is actually caused by government activities.[78]

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[74] Ortmann and Schlesinger, above n 66 at 103.
[75] Levitt, above n 32 at 49.
[76] See above at 63 - 64.
[77] Those public goods which are only considered desirable by a minority of citizens are deemed 'merit' goods by Gassler, whilst if a minority desire a *lower* level of a public good than the state is supplying, their attempts to counter this are 'demerit' goods (Gassler (1986), above n 6 at 29; Gassler (1990), above n 6 at 142).
[78] Levitt, above n 32 at 52.

As with Weisbrod's market failure theory,[79] the first limitation of Levitt's theory is that it fails to explain why CSOs, rather than the market, provide the public goods which the state does not.[80] More significantly, the proposition that the government's failure to provide appropriate levels of public goods is due to the fact that it will provide only those goods requested by the majority is overly simplistic. In reality, the problem is more complex. At a domestic level, governments are most likely to be influenced by those interest groups with the loudest voice,[81] typically those groups with the greatest resources to devote to political lobbying and party contributions, as opposed to the electorate. Also, governments are likely to be influenced by international peer pressure and concern for their standing on the world stage. This is evidenced by the fact that much of the public goods provision in the context of pollution reduction has been agreed at a global level.[82] Of course, no government will be wholly blind to the desires of the electorate; otherwise it would risk being replaced at the next election. However, the significance of this may be somewhat limited by the phenomenon of voter apathy, whereby the 'majority' which votes a particular government into office is not necessarily the majority of the electorate.[83] Also, there is a strong temptation for the party in power to focus on the wants of floating voters, undermining its representative role further still. The cumulative effect of these considerations is likely to be a state unable to provide all the public goods requested by the majority, let alone minority groups.

Government failure theory is also misleading in that it does not take into account the emergence of a considerable 'contract culture',[84] whereby the government engages CSOs to carry out, amongst other activities, public goods to which it is committed. Government failure theory states that the role of organised civil society is to provide

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[79] See above at 63 - 65.
[80] Hansmann (1987), above n 31 at 29.
[81] See further Craig, P., *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford, Clarendon Press, 1990).
[82] See e.g. *Third Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change 1997* (the 'Kyoto Summit').
[83] E.g. turnout at the 2001 general election was 59.4%, a significant drop from 71.4% in 1997 and 77.7% in 1992 (Electoral Commission, *General Election 2001: The Official Results* (London, Politico's Publishing, 2001) at 70. Local election turnout is significantly lower: 32.8% in 2002 (Electoral Commission statistics, www.electoralcommission.org.uk/ elections/publicparticipation.cfm).

public goods for minority groups, not to provide majority-approved goods on behalf of the government. Thus, if the theory explained everything, whenever CSOs contract with the government they would 'violate their theoretical *raison d'êtr*e'.[85] It is interesting to note at this point that, until recently, the Charity Commission appeared to reject the theory of government failure,[86] at least in the context of charities, as its position was that it was not acceptable, for those charities which contract with local government to carry out services which fall under authorities' statutory duties, to use charity resources to supplement the level of service provision except in the short-term;[87] rather, they should use legitimate political activity to lobby the government to provide more.[88] However, in 2004, when considering the charitable status of two trusts which carried out such services,[89] the Commission conceded that charities may subsidise services in this way under the current law, so long as it is 'in the charity's best interests' to do so and the trustees do not step outside the terms of their authority.[90]

(5) Salamon's theory of voluntary failure[91]

Salamon's theory of voluntary failure suggests that organised civil society is fundamentally better suited to public goods provision than the state. Rather than simply turning to CSOs when citizens are not satisfied with the state's performance, they should be the preferred response to market failure to provide optimal levels of public goods.[92] There is some anthropological support for this: in early civilisations,

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[84] See above Ch 2, n 73 and associated text.
[85] Salamon (1987a), above n 33 at 35.
[86] Charity Commission, *CC37: Charities and Contracts* (www.charity-commission.gov.uk, Charity Commission, 2003) paras 30 – 32.
[87] Charity Commission, above n 86 para 32. On the level of service provision when the state contracts with a charity generally, see Morris, D., 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities' in Dunn, A. (ed.), *The Voluntary Sector, the State and the Law* (Oxford, Hart, 2000) at 136 – 138.
[88] Charity Commission, above n 86, para 31. On the political role of organised civil society, see below at 91 - 96.
[89] *Decisions of the Charity Commissioners*, 21 April 2004, para 6.2.5.
[90] *Ibid*, para 6.1.9. The Commission has since issued fresh policy guidance reflecting this change of position: see Charity Commission, *Policy Statement on Charities and Public Service Delivery* (www.charity-commission.gov.uk, Charity Commission, 2005).
[91] See generally: Salamon (1987a), above n 33; Salamon (1987b), above n 33 at 111 - 113.
[92] Salamon in (1987a), above n 33 at 39.

public goods are produced at a tribal or familial level,[93] and several commentators view organised civil society as having developed from the family unit.[94] If we acknowledge that organised civil society is 'more than simply residual or derivative' but at the 'core of the political economy',[95] it becomes necessary to explain (i) why CSOs are more suited to public goods provision than the state and (ii) when CSO provision will be sub-optimal and thus necessitate state intervention (either in the form of regulation or the provision of more public goods). In answer to the first question, we can note that CSOs are more institutionally efficient,[96] more expert[97] and less affected by political distractions than government. In answer to the second, Salamon identifies four possible causes of organised civil society's failure to produce optimal amounts of public goods: philanthropic insufficiency, philanthropic particularism, philanthropic paternalism and philanthropic amateurism.[98]

Advantages of civil society over government

Efficiency

The first advantage that CSOs have over government is their institutional efficiency,[99] which results largely from their size. CSOs are typically much smaller than government institutions, which means that their transaction costs are lower. Salamon notes that in order for government to start supplying a public good: [100]

> 'substantial segments of the public must be aroused, public officials must be informed, laws must be written, majorities must be assembled, and programs must be put into operation'.

This is exacerbated by the phenomenon of 'institutional stickiness', whereby large bureaucracies are unwilling to abandon established policies and activities, tending

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[93] Krashinsky, above n 10 at 114.
[94] See above Ch 2 at 40.
[95] van Till, J., 'The Three Sectors: Voluntarism in a Changing Political Economy' in S. Ostrander and S. Langton, n 33 at 53.
[96] Salamon (1987a), above n 33 at 39.
[97] *Ibid* at 44.
[98] *Ibid* at 39 - 41.
[99] Salamon (1987a), above n 33 at 39; Morris, S., 'Defining the Nonprofit Sector: Some Lessons from History' (2000) 11(1) *Voluntas* 25 at 27.

naturally towards inertia rather than change.[101] By comparison, CSOs can commence provision simply with 'a handful of individuals acting on their own' and will thus be more cost-effective.[102] There is support for this in microeconomic theory, which suggests it will be less costly for smaller organisations to undertake new activities than for large organisations.[103] The small scale of CSOs enables them to 'form and disband' with ease,[104] minimising the response time to the 'unpredictable and often changing' public goods requirements of society.[105]

The problem with this argument is that it is dependent on CSOs being small organisations. In reality, the idea that CSOs are 'small' and government agencies 'large' is overly simplistic. Many successful CSOs are large organisations, whilst many government agencies are comparatively small: for example, the National Trust (the second largest fundraising charity in the UK terms of income,[106] and arguably the largest provider of public goods through its conservation activities) employs in the region of 4,000 full-time staff, 4,000 part-time staff and has over 34,000 volunteers,[107] whereas the Charity Commission is staffed by just 600.[108] Therefore it will not always be true to say that trustees will not be distanced from the grassroots by organisational

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[100] Salamon (1987a), above n 33 at 39.
[101] See generally Genschel, P., 'The Dynamics of Inertia: Institutional Persistence and Change in Telecommunications and Health Care' (1997) 10 *Governance* 43.
[102] Salamon (1987a), above n 33 at 39. See also Douglas, above n 43 at 49 – 50; James, E., 'Economic Theories of the Nonprofit Sector: A Comparative Perspective' in Anheier and Seibel, above n 33 at 24; Simon, J., 'Modern Welfare State Policy Toward the Nonprofit Sector: Some Efficiency – Equity Dilemmas' in Anheier and Seibel, above n 33 at 32; Knapp, M., Robertson, E. and Thomason, C., 'Public Money, Voluntary Action: Whose Welfare?' in Anheier and Seibel, above n 33 at 204 – 205.
[103] Olson, above n 41 at 5 – 55. See also Coase, R., *The Firm, The Market and The Law* (Chicago and London, University of Chicago Press, 1988) at 42 - 47; noted in Young, above n 56 at 153; Anheier, H., 'Foundations in Europe: a Comparative Perspective' in Schlüter, A., Then, V. and Walkenhorst, P. (eds.) *Foundations in Europe: Society Management and Law* (London, Directory of Social Change, 2001) at 69.
[104] Salamon (1987a), above n 33 at 44. Also noted by: Home Office, *Charities: A Framework for the Future* (London, HMSO, Cmnd 694, 1989) para 1.4; Knapp *et al*, above n 102 at 205 – 206.
[105] Morris, above n 87 at 128.
[106] Charities Aid Foundation, *Dimensions 2002 Update of CAF's Top 500 Fundraising Charities* (West Malling, Kent, Charities Aid Foundation, 2002) at 14.
[107] National Trust, *Annual Report and Accounts 2002/2003* (http://www.nationaltrust.org.uk/main/nationaltrust/agm/2003/report_accounts.html, National Trust, 2003) at 12.
[108] Charity Commission, *Charity Commission Corporate Plan 2003 – 2006* (London, Charity Commission, 2002) at 15.

structure,[109] or that it will be comparatively easy for a CSO to commence production of a novel public good. Furthermore, it is not at all clear that, in practice, a small organisation will always be more efficient than a large organisation. Empirical research by Kendall in the context of the provision of residential care, for example, suggests that CSOs have an edge over their private sector counterparts partly because they are 'relatively large' by comparison,[110] and accordingly are able to take advantage of 'technical economies of scale and scope, cross-subsidy from other current activities… and historically accumulated reserves'.[111] Even in a sphere where CSOs are typically small, it does not follow that their efficiency turns on size alone – other factors, such as the ability to utilize volunteer labour,[112] or raise finances,[113] will also play a part.

One particular situation where a CSO might be deemed more efficient than either the state or the market is in relation to so-called 'relational goods'. These are goods which depend on interpersonal relationships for their utility and which 'can be enjoyed only by participating in a social process'.[114] Ben-Ner and Gui argue that these relationships will be more 'satisfactory' when consumers are able to participate as stakeholders in the organisation,[115] as they will have a greater opportunity to 'express their intentions, opinions and desires' than if they engaged with a private firm or the state.[116] It seems likely that this will also, in part, turn on the size of any given CSO, as the greater the number of members or stakeholders, the quieter their individual voices will be.[117]

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[109] See Bennett, J. and DiLorenzo, T., *Unfair Competition: The Profits of Nonprofits* (Lanham, Maryland, Hamilton Press, 1989) at 48 – 49.
[110] Kendall, J., *The Voluntary Sector* (London, Routledge, 2003) at 169.
[111] *Ibid.*
[112] See Kendall, *ibid*, in the context of day care provision.
[113] See Kendall, *ibid* at 192, in the context of environmental organisations and the dissemination of information.
[114] Ben-Ner, A., and Gui, B., 'The Theory of Nonprofit Organisations Revisited' in Anheier, H., and Ben-Ner, A. (eds.), *The Study of the Nonprofit Enterprise: Theories and Approaches* (New York, Kluwer / Plenum, 2003) at 14. See also Gui, B., 'Interpersonal Relations: a Disregarded Theme in the Debate on Ethics and Economics' in Lewis, A, and Warneryd, K. (eds.), *Ethics and Economic Affairs* (London, Routledge, 1994).
[115] On the stakeholder theory of CSOs generally, see Ben-Ner, A., and Van Hoomissen, T., 'Nonprofit Organisations in the Mixed Economy: A Demand and Supply Analysis' (1991) 62 *Annals of Public and Cooperative Economics* 519.
[116] Ben-Ner and Gui, *ibid* at 16.
[117] This suggests that it may, in fact, be inappropriate to classify relational goods as public goods, as some commentators do (see Ben-Ner and Gui, *ibid* at 14). If a network's

Expertise

Salamon suggests that the small size of CSOs should also encourage expertise.[118] Much has been written on the nature of expertise, and a detailed exposition is outside the scope of this thesis.[119] For present purposes we can note that the label is generally taken to mean more than merely some acquired skill or specialist knowledge; in addition, it connotes the ability to utilise that skill or knowledge when faced with novel problems.[120]

We have already noted that the state is unlikely to be able to provide public goods which suit the different preferences of different groups of citizens. This is exacerbated by the fact that even if the state *were* minded to look beyond the majority of the electorate or the most powerful interest groups, it would be difficult for its agencies to target public goods provision so as to reflect minority preferences, as they will tend to lack knowledge of the various preferences held by each minority group. Organised civil society, on the other hand, will in theory enable more targeted provision. We have already noted that a minority preference group can either (i) create a new CSO to supply the desired public goods or (ii) utilise an existing CSO with similar, if not identical, preferences.[121] The former strategy will obviously reflect their preferences, as the group will be able to set the CSO's service parameters. In the latter scenario, whilst the group's preferences might not exactly match those of an existing CSO, there is a greater likelihood, compared with government provision, that the group's particular preferences will be taken into account, as the relatively small size of the CSO means that their individual contributions (or potential contributions) will be proportionately more important and there is therefore an incentive for CSOs to 'tailor services to client needs'.[122] Moreover, there is a greater chance that these preferences

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effectiveness depends upon its small size, then, beyond a certain point, the greater the number of members, the less utility each will have. Therefore, it cannot be said that the goods are nonrivalous. (Neither are they nonexcludable in any meaningful sense, as it will always be a simple matter to restrict membership.)

[118] Salamon (1987a), above n 33 at 44; Morris, above n 99 at 27.

[119] For an overview of the various theories of expertise, see Gaines, B., 'The Collective Stance in Modelling Expertise in Individuals and Organizations' (1994) 7 *International Journal of Expert Systems* 21 (extended version available online at ksi.cpsc.ucalgary.ca/articles/Collective/).

[120] See generally Schon, D., *The Reflexive Practitioner* (New York, Basic Books, 1983).

[121] See above at 58.

[122] Salamon (1987a), above n 33 at 44. See also Home Office, above n 104, para 1.4.

will be accurately represented to high level decision-makers within a CSO, as a smaller organisational structure means fewer opportunities for information to become distorted as it filters up through the various stages of administration from the coalface to the trustees.[123] In addition to minority groups, the government may wish to utilise the expertise of CSOs for the same reasons. Public goods provision on a small scale also encourages diversity, providing greater 'consumer choice' of goods provision.[124]

Again, Salamon's thesis is limited in that it is dependent on CSOs being small organisations: in the case of large CSOs, trustees are likely to be distanced from the grassroots by organisational structure.[125] However, we can note that, as with efficiency, there are factors other than organisational size which contribute to the expertise of CSOs. In particular, we can note that both (i) the facilitation of entrepreneurship and (ii) the civil society 'ethos' will tend towards expertise. First, those CSOs that provide the appropriate conditions for entrepreneurial activity, discussed in detail below,[126] will, by definition, be able to apply their skills or knowledge bases to novel situations. Second, according to the exchange theory of expertise, 'the more valuable to a person is the result of his action, the more likely he is to perform the action'.[127] Accordingly, if some philanthropic or charitable satisfaction is derived by actors from their successful pursuit of civil society activity, this utility will encourage them to repeat the activity and thus, over time, develop specialised skills or knowledge.

Salamon suggests that CSOs have the 'capacity to avoid fragmented approaches and to concentrate on the full range' of public goods needs.[128] Although in theory the sector

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[123] Referred to as the sector's 'modelling function' (Langton, S., 'The New Volunteerism' (1981) 10 *Journal of Voluntary Action Research* 7 at 11). See also Salamon (1987a), above n 33 at 44; Young, above n 56 at 154; Clark, J., 'The State, Popular Participation and the Voluntary Sector' in Hulme, D. and Edwards, M. (eds.), *NGOs, States and Donors: Too Close for Comfort* (Basingstoke and London, MacMillan, 1997) at 46.

[124] Knapp *et al*, above n 102 at 202. See also: Salamon (1987a), above n 33 at 44; Rose-Ackerman, S., 'Altruism, ideological entrepreneurs and the non-profit firm' (1997) 8(2) *Voluntas* 120 at 124; Voluntary Sector Roundtable Panel on Accountability and Governance in the Voluntary Sector, above n 4 at 12; Douglas, above n 43 at 46 – 48.

[125] See Bennett, J. and DiLorenzo, T., *Unfair Competition: The Profits of Nonprofits* (Lanham, Maryland, Hamilton Press, 1989) at 48 – 49.

[126] See below at 105 - 111.

[127] Gaines, above n 119 at 3.3.

[128] Salamon (1987a), above n 33 at 44.

should be able to provide a broader range of services than the government for the reasons considered above, it is not clear that organised civil society provision as a whole will be any less fragmented than state provision. If anything, it would seem that the opposite is likely, as without some form of regulation to provide direction, whether from an external body or self-regulation, it is hard to see how a disparate collection of hundreds of thousands of organisations varying in size, structure and purpose will be able to co-ordinate their activities on any meaningful level.[129] That said, some degree of co-operation is clearly possible: empirical research undertaken by the Charity Commission notes that 22% of registered charities currently participate in collaborative working of varying levels of formality.[130]

Insulation from politics

The third advantage of organised civil society is its relative insulation from political considerations.[131] Because CSOs do not have to worry about being removed at the next election, unlike the government, they are less affected by the consideration of time,[132] which enables them to adopt a long-term strategy for their public goods provision; for the same reason, they are also freer to pursue innovative methods of production.[133] The use of CSOs draws attention away from the government when the goods in question are 'culturally sensitive'.[134] On the other side of the coin, there may be a 'social stigma' attached to government intervention in a particular situation which organised civil society may also be able to avoid.[135] CSOs are also useful in garnering resources without alienating the electorate by increasing taxation.

However, this also paints a somewhat simplistic picture. It is naïve to suggest that CSOs are unaffected by political considerations - just as governments must appease

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[129] See below Ch 4 at 138 - 140.
[130] Charity Commission, *RS4: Collaborative Working and Mergers* (London, Charity Commission, 2003) under 'Extent of collaborative working'.
[131] See Saidel, J., 'Dimensions of Interdependence: The State and Voluntary-Sector Relationship' (1989) 18(4) *Nonprofit and Voluntary Sector Quarterly* 335 at 343; also Douglas, above n 43 at 50.
[132] Gassler (1990), above n 6 at 143; Anheier, above n 104 at 69.
[133] For further on organised civil society as innovator, see at 97 - 99.
[134] Boris, E., 'Nonprofit Organisations in a Democracy: Varied Roles and Responsibilities' in Boris, E. and Steuerle, E. (eds.), *Nonprofits and Government Collaboration and Conflict* (Washington, DC, Urban Institute Press, 1999) at 21.
[135] Douglas, above n 43 at 50.

voters and interest groups, so too must CSOs appease their own 'multiple constituents' and engage in micro level politics.[136] As well as taking into account the preferences of their existing members and donation base, CSOs will need to consider their own image in order to increase levels of public support. In addition, CSOs which enter into funding arrangements with government bodies will also have to take their interests into account, as the terms of an individual contract (or grant)[137] will inevitably reflect the political concerns of the funding body. Furthermore, those CSOs which rely on government funding have an incentive to ensure they remain politically fashionable in order to secure future income. CSOs are also not immune from the macro level politics more normally associated with government – those which engage in the campaigning and lobbying of government, or, more formally, in consultation processes, necessarily occupy a space in the political arena,[138] and may need to consider whether shifting the focus of their activities to new public goods will see them cast as fickle service providers by the media.

Philanthropic failures

Having argued that CSOs are superior public goods providers in comparison to government, Salamon identifies four simple problems that may prevent organised civil society from producing optimal amounts of public goods, thereby justifying government action.

Philanthropic insufficiency

The first problem that may arise is if organised civil society as a whole is unable to

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[136] O'Regan, K. and Oster, S., 'Nonprofit and For-Profit Partnerships: Rationale and Challenges of Cross-Sector Contracting' (2000) 29(1) (Supplement) *Nonprofit and Voluntary Sector Quarterly* 120 at 123. Consider e.g. the recent disputes between the National Trust and the Devon and Somerset Staghounds and Quantock Staghounds in relation to the use of land owned by the Trust (*R* v *National Trust for Places of Historic Interest or Natural Beauty, ex parte Scott* [1998] 1 WLR 226 and *Scott* v *National Trust* [1998] 2 All ER 705; see also below Ch 7 at n 96 and associated text) and between the RSPCA and various pro-hunting lobby groups in relation to excluding pro-hunting activists from its membership (*Royal Society for the Prevention of Cruelty to Animals* v *Attorney General* [2002] 1 WLR 448).

[137] Government grants will frequently be as prescriptive as contracts: see further Garton, J., 'Charities and the State' (2000) 14 TLI 93 at 95 – 96.

[138] See below at 91 - 96. See e.g. the social housing sector and, to a lesser extent, the provision of care for the elderly (see Kendall, above n 110 at 144 – 145, 176 – 178).

generate sufficient, stable resources to satisfy demands for public goods. Although we have already noted how CSOs can be used to circumvent free-riding, the phenomenon affects organised civil society as well as the market as there will always be consumers who consider it an effective means of maximising their own utility.[139] Even where organised civil society as a whole is well resourced, there may be localised problems, such as difficulty in attracting funding for particular goods or a lack of CSO presence in a particular geographic area.[140]

Philanthropic particularism

Lack of available funding for particular goods can in turn lead to particularism, whereby CSOs are naturally drawn to providing those public goods that attract the most resources.[141] This will mean that less lucrative goods will be neglected, and low CSO activity may, in turn, mean that those who *are* willing to fund the goods have no vehicle to supply them. Conversely, high CSO activity in relation to more popular goods may result in 'wasteful duplication of services'.[142]

Philanthropic paternalism

Salamon suggests that, whilst in theory organised civil society should operate in such a way that small groups of citizens are able to fund their own public goods preferences, in practice the sector's goods provision as a whole will represent the preferences 'not of the community but of its wealthy members'.[143] This may result in 'a debilitating sense of dependency' on the part of those who benefit from CSO activity.[144]

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[139] Salamon (1987a), above n 33 at 39. On the issue of securing stable resources generally, see Mitchell, C., 'Saving for a Rainy Day: Charity Reserves' (2002) 8 CL & PR 35; Morris (2000), above n 84; Morris, above n 87.

[140] Salamon (1987a), above n 33 at 40; Salamon (1987b), above n 33 at 111. See also Kendall, above n 110 at 118 – 119.

[141] Salamon (1987a), above n 33 at 41; Salamon (1987b), above n 33 at 111 – 112. See also Kendall, above n 140 at 119 – 120; Kuti, E., 'The possible role of the non-profit sector in Hungary' (1990) 1(1) *Voluntas* 26 at 27. For empirical data confirming philanthropic particularism, see L. Salamon, 'Nonprofits: the Results are Coming' (1984) 25 (4) *Foundation News* 16.

[142] Salamon (1987a), above n 33 at 41.

[143] Salamon (1987a), above n 33 at 41; Salamon (1987b), above n 33 at 112; Kendall, above n 110 at 120 - 121.

[144] Salamon (1987b), above n 33 at 112.

Philanthropic amateurism

We have already noted that the paradigm CSO is either managed by volunteers or reliant upon a volunteer workforce.[145] Whilst this is seen by many as a strength for several reasons, e.g. because it encourages entrepreneurship and civic participation,[146] it may also be a weakness if it results in goods of poor quality.[147] This will be a risk where a CSO is unable to attract a highly qualified and experienced workforce or management team because it cannot afford to remunerate them for their services.

(6) Public goods and the public benefit test

It is worth noting at this stage the relationship between the concept of public goods and the current regulatory requirement in England, whereby CSOs who wish to obtain charitable status must be able to show that their purposes enure to the public benefit.[148] Despite their similar labels, public benefit is not synonymous with the concept of public goods.[149] Charities do not need to provide products that are either nonrivalous or nonexcludable (although, of course, they may do). In order to satisfy the public benefit test, organisations must simply show (i) that their purposes benefit a cross-section of the general public and (ii) that a sufficient number of people are entitled to benefit so as to constitute a cross-section of society.[150] It is not surprising that there is not an exact correlation between public benefit and public goods, as the foundations of

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[145] See above Ch 2 at 49 - 50.

[146] See below at 95 – 96, 111.

[147] Salamon (1987a), above n 33 at 41; Salamon (1987b), above n 33 at 112 – 113; Kendall, above n 110 at 121. See also Smith, S., and Lipsky, M., *Nonprofits for Hire: The Welfare State in the Age of Contracting* (Cambridge, Mass, Harvard University Press, 1993) on the 'uneven and unpredictable' (at 113) nature of civil society activity in the context of the service contracts between CSOs and government.

[148] *Jones* v *Williams* (1767) Amb 651.

[149] In Australia, which shares the English definition of public benefit, the abandoned Charities Bill 2003 proposed that public benefit be defined as being that which is 'aimed at achieving a universal or common good' (s 7(1)(a)). This appears to have been in response to the submissions made by a number of charities to the Charities Definition Inquiry, which suggested that public benefit is synonymous with the provision of public goods or 'near' public goods. The Inquiry states that this restatement of public benefit reflects the current legal position; however, the submissions concerning public goods were acknowledged without comment in its final report (Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Canberra, Commonwealth of Australia, 2001) at 118 – 119).

[150] *Oppenheim* v *Tobacco Securities Trust Co* [1951] AC 297 at 306 *per* Lord Simonds.

charity law predate explicit academic identification and discussion of public goods by over three centuries. Yet despite this, the concepts enjoy several shared characteristics on different several levels.

Public goods and indirect public benefit

At one level, it can be argued that despite the disparity between the concept of public goods and the test of public benefit, all charitable purposes result in the creation of public goods. This is because one of the rationales for conferring the advantages of charitable status on CSOs is the idea that the public as a whole takes an indirect benefit from each isolated act of philanthropy carried out by charitable bodies. In other words, every time poverty is relieved, for example, society as a whole is somehow elevated. This indirect benefit is clearly both nonrivalous and nonexcludable, for it is not diminished if more people enjoy the benefit, nor is it possible to exclude anyone from enjoying this benefit; therefore, it is a paradigm public good.

There is some support for this argument in the caselaw. Organisations which promote animal welfare have been upheld as charitable, not because of the direct benefit to the animals in question,[151] but because they indirectly 'promote public morality by checking the innate tendency to cruelty'.[152] As Chitty J stated in the leading case of *Re Wedgwood*:[153]

> A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

Similarly, in *Neville Estates* v *Madden*,[154] Cross J held that an unincorporated association which ran a private synagogue for the sole use of members satisfied the

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[151] This satisfies the public benefit test in Ireland: see *Armstrong* v *Reeves* (1890) 25 LR Ir 325.
[152] *Re Green's WT* [1985] 3 All ER 455 at 457 *per* Nourse J.
[153] [1915] 1 Ch 113 at 122.
[154] [1962] Ch 832.

public benefit test indirectly as 'benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens'.[155]

There are however a number of limitations with this approach to public benefit. First, whilst those purposes which satisfy the public test also result in indirect benefit to the whole of society, indirect public benefit alone will not always satisfy the test. In *Gilmour* v *Coats*,[156] which concerned an enclosed order of Carmelite nuns which was unable to demonstrate public benefit in its activities of the kind in *Neville Estates* v *Madden* as there was no mixing with fellow citizens, the House of Lords rejected the idea that the public benefit test could be satisfied by reference to the indirect public benefit of 'the edification of a wider public by the example of lives devoted to prayer',[157] as this was too 'vague and intangible' to be justiciable.[158] Furthermore, when considering the extent of public benefit under the fourth head of charity in *Baddeley* v *Inland Revenue Commissioners*,[159] Viscount Simonds, whilst recognising an indirect benefit to wider society from all charitable pursuits, expressed doubt as to whether this was an appropriate way of accounting for a body of caselaw which owes more to incremental development by way of drawing analogies with purposes listed in the preamble to the Statute of Uses 1601 than any overarching principle.[160]

Second, it is possible to find indirect public benefit of this type, which technically corresponds with the concept of public goods, in the activities not just of wider civil society but also of both the private and public sectors. For example, the operation of any private enterprise may have indirect public benefits such as the creation of jobs[161] and contribution towards the economy, which elevate society. Similarly, state functions such as the provision of a judicial system and a national health service have an equivalent indirect benefit extending beyond those individuals who avail themselves of these services. One could argue that to define either charities or wider

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[155] Above n 154 at 853.
[156] [1949] AC 426.
[157] Above n 156 at 442 *per* Lord Simonds.
[158] Above n 156 at 446 *per* Lord Simonds.
[159] [1955] AC 572.
[160] Above n 159 at 590.

civil society in terms of the provision of this kind of public good is therefore meaningless, as every organisation across every sector, with the exception of those which seek to subvert society, will indirectly produce some kind of public good.

Whilst there is some strength in this argument, we should note that a distinction can be drawn between charitable CSOs (and also public bodies) and private organisations. Whilst the activities of a private enterprise may result in the creation of public goods at this intangible level, this is not its purpose; that is profit-maximisation. Conversely, it is the purpose of a charity, at least theoretically, to provide public goods. Accordingly, it is the purposes of a charity rather than its activities to which the public benefit test relates. The Charity Commission has made numerous attempts in recent years to turn the focus of charitable status towards an organisation's activities as well as its purpose. In 1996 the Commission proposed unsuccessfully that only organisations which could demonstrate how their activities would accomplish their charitable purpose should be admitted onto the register of charities.[162] In 1999, when the Commission recognised for the first time the promotion of urban and rural regeneration as a distinct charitable purpose,[163] it stated that a successful registration would have to demonstrate that the charity would undertake 'at least three or four' activities covering a 'broad spectrum of regeneration work'.[164] This attitude is explained by the fact that the Commission has both gate-keeping and regulatory functions, being responsible not just for registering charities but also overseeing their conduct afterwards; it is clearly administratively efficient to iron out as many potential problems with an organisation's existing or proposed activities (e.g. if they fall outside the scope of its stated purpose) at the time of registration.[165]

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[161] Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (London, HMSO, 2002), para 4.5.

[162] Charity Commission, *Draft Framework for the Review of the Register of Charities* (London, HMSO, 1996). In response to negative feedback (e.g. NCVO, *Charity Commission Review of the Register: NCVO's Response to the Draft Framework for the Review* (London, NCVO, 1998), para 3.2), this proposal was dropped in the final review: Charity Commission, *RR1: The Review of the Register of Charities* (London, HMSO, 2001).

[163] Charity Commission, *RR2: Promotion of Urban and Rural Regeneration* (London, HMSO, 1999), para 6.

[164] Charity Commission, above n 163, para 8.

[165] See Mitchell, C., 'Reviewing the Register' in Mitchell, C. and Moody, S. (eds.), *Foundations of Charity* (Oxford, Hart, 2000) at 185.

There are also several examples in the caselaw where activities have been taken into account when determining charitable status, most recently in *Southwood* v *Attorney-General*,[166] where the Court of Appeal relied on evidence of an organisation's past activities to deny charitable status despite it having purposes which were 'redolent with the flavour of charity'.[167] Nevertheless, it is not clear that consideration of an organisation's activities is officially part of the public benefit test, and in 2002 the consultation paper released by the Prime Minister's Strategy Unit recommended that activities should not be a defining factor. The paper considered that basing charitable status on activities rather than purposes would risk the 'stifling of initiative and innovation'.[168] There is also a perceived danger that an activities-based test would have ramifications for the independence of the sector.[169] Under the current law, although it is the state (through the law courts and the Charity Commission) that decides from time to time which purposes are to be considered charitable, charities are free to engage in any activities that are legitimately directed towards the accomplishment of these purposes.[170] An activities-based test would effectively mean that charities would not be free to choose how to work towards a particular charitable purpose, for each activity undertaken would need the approval of the court or the Commission.

Public goods and direct public benefit

We can say two things about the relationship between direct public benefit and public goods. First, the Preamble to the Statute of Charitable Uses and the subsequent caselaw can both be viewed as implicitly acknowledging the importance of public goods at a practical level. Second, public benefit under the fourth head of charity –

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[166] *The Times*, July 18, 2000

[167] CA transcript, para 4 *per* Chadwick LJ. Another recent example is *IRC* v *Oldham Training and Enterprise Council* [1996] STC 1218.

[168] Above n 161 para 4.11. For discussion of the significance of initiative and innovation in organised civil society generally, see below at 106 - 108.

[169] Also noted in the Strategy Unit report, above n 161, para 4.11.

[170] With the exception of political activities, which must not be the main activity of a charity (Charity Commission, *CC9: Political Activities and Campaigning by Charities* (London, HMSO, 2004), para 23).

'other purposes beneficial to the community'[171] – replicates one of the characteristics of public goods, as the test laid down in *Baddeley* v *Inland Revenue Commissioners* operates to ensure that charities under this head only provide goods and services in a nonexcludable fashion.[172]

English charity law can be viewed as utilitarian in nature. The list of purposes in the Preamble, which demonstrates 'the kind of charity the State wished to encourage',[173] reflects legal charity's origin in the activities of the Protestant Church of England, which played a 'fundamental' role in maintaining the structure and social fabric of British society in the seventeenth century.[174] Furthermore, the proliferation of charity law cases in the nineteenth century that expanded upon these original purposes has been attributed to the Victorian social conscience.[175] What is significant for our purposes is that many early charitable purposes are of a kind which we would now recognise as public goods: for example, the Preamble includes purposes which cover environmental concerns ('the repair of … sea-banks'),[176] law and order ('the maintenance of houses of correction'),[177] and national security ('the aid or ease of any poor inhabitants concerning the payment of fifteens [and] setting out of soldiers'),[178] all of which are nonexcludable and nonrivalous. Francis Moore, writing at the time the Statute of Charitable Uses was enacted, was of the view that its aim was to encourage activities which benefited the whole of society.[179]

This concern with improving the general quality of life across society is further illustrated by the fact that it will not suffice for an organisation which advances religion to rely on spiritual benefits to satisfy the public benefit test. In *Gilmour* v

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[171] *Income Tax Special Purposes Commissioners* v *Pemsel* [1891] AC 531 at 583 *per* Lord Macnaghten. See also *Morice* v *Bishop of Durham* (1805) 9 Ves 399 at 531 *per* Sir Samuel Romilly (arguing as counsel): 'the advancements of objects of general utility'.
[172] [1953] Ch 504.
[173] Jones, G., *History of the Law of Charity 1532 - 1827* (Cambridge, CUP, 1969) at 27.
[174] Woodfield, 'Doing God's Work: Is Religion Always Charitable?' (1996) 8 *Auckland Law Review* 25 at 27.
[175] *Ibid.*
[176] Preamble, Statute of Charitable Uses 1601 as translated into modern English in Picarda, H., *The Law and Practice Relating to Charities* (London, Butterworths, 1999, 3rd ed.) at 9.
[177] Preamble, Statute of Charitable Uses 1601, above n 176.
[178] Preamble, Statute of Charitable Uses 1601, above n 176.
[179] Francis Moore, *Reading on the 1601 Statute* (1607), quoted in Jones, above n 173 at 27.

Coats,[180] in addition to the edification argument discussed above,[181] the House of Lords refused to recognise public benefit in the activities of a closed order of nuns who had no contact with the outside world but merely indulged in 'sequestered piety'.[182] The argument that there was a spiritual benefit from the nuns' acts of prayer was rejected, as 'good works demanded participation in mundane affairs, not withdrawal from them through flight to monastery'.[183] This was affirmed in *Re Warre's Will Trusts*,[184] where it was held that that spiritual activities are 'no doubt good for the soul and may be of benefit by some intercessory process of which the law takes no notice but they are not (legally speaking) charitable activities'.[185]

Implicit recognition of the importance of the provision of public goods can also be found with regard to the public benefit test under the fourth head of charity. In *Baddeley* v *Inland Revenue Commissioners*, Lord Simonds stated that an organisation will not be granted charitable status if its direct beneficiaries are limited to a 'class within a class'.[186] In other words, no individual or group of people may be declared ineligible to take advantage of a charity's services except insofar as the inherent nature of the service limits beneficiaries: for example, a organisation with the purpose of treating the sick could legitimately turn away the healthy, but could not limit itself to treating only the sick members of a specific group of people. In laying down this test, His Lordship effectively ensured that all charities which fall under the fourth head perform their services as though they were nonexcludable.

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[180] Above n 156.
[181] See above, text relating to nn 157 and 158.
[182] Blakeney, M., 'Sequestered Piety and Charity' (1981) 2 Jnl Leg Hist 207.
[183] Merton, R., *Science, Technology and Society in Seventeenth Century England* (New York, Howard Fertig, 1970) at 62, quoted in Blakeney above n 182 at 214.
[184] [1953] 1 WLR 725.
[185] Above n 184 at 729 *per* Harman J. It should be noted, however, that there are ways of explaining the law's attitude to spirituality without implicit reference to public goods. In *Gilmour* v *Coats* itself the House of Lords regarded their conclusion as the inevitable consequence of a court system only equipped to deal with evidence that is capable of proof – at 446 *per* Lord Simonds; at 453 *per* Lord du Parcq. Others have suggested, less convincingly, that it is the manifestation of bias against the Roman Catholic church, which places more emphasis on spirituality than the established church – for example, Blakeney, above n 182. For a summary of evidence to the contrary, see Rickett, C., 'An Anti-Roman Catholic Bias in the Law of Charity?' [1990] Conv 34.
[186] Above n 159 at 591. The only exceptions to this seem to be if the organisation limits its work to a particular geographic area (Lord Simonds, above n 159 at 591); or if the limitation is reasonably related to its charitable purpose (*Re Dunlop* [1984] NI 408).

D. PROVISION OF PRIVATE GOODS: INTANGIBLE SERVICES AND RE-DISTRIBUTION OF WEALTH

Hansmann's theory of contract failure and the lack of trust towards the market are not limited in their applicability to the provision of public goods. There is a need for trustworthy organisations to provide certain types of private goods or services which are afflicted by information asymmetry, and which do not lend themselves easily to evaluation. For the same reasons as noted in our discussion of public goods,[187] CSOs therefore provide an attractive alternative to the market where this is the case. The two types of good where information asymmetry results in a strong CSO presence as service provider are (i) those where the service provided is intangible in nature and (ii) those where the purchaser is not the consumer or beneficiary and the result is essentially a redistribution of wealth.

(1) Intangible services

The first type of private goods commonly provided by organised civil society consists of services which, by their intangible nature, are too 'complex and difficult' to evaluate,[188] even when the purchaser and consumer are same or are able to communicate with ease.[189] Organised civil society's role here is evidenced by prominent charitable activity under the second and fourth heads of charity (the advancement of education and the provision of social welfare as a purpose beneficial to the community),[190] and CSOs engaged in this function are strongly represented in the twenty most successful fundraising charities in 1999/2000.[191] Commonplace

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[187] See above at 65 - 68.
[188] Hansmann (1987), above n 31 at 70 – 71.
[189] Hansmann (1986), above n 31 at 30; Hansmann (1987), above n 31 at 70 – 71.
[190] Aspects of social welfare provision are sometimes classified under an extended first head of charity covering the 'relief of poverty, the impotent and the aged' (e.g. Warburton, J., *Tudor on Charities* (London, Sweet and Maxwell, 1995) at 20); however, there is no logical reason for this grouping and the most recent leading text places the provision of social welfare which is unrelated to poverty under the fourth (Picarda, above n 176 at 13).
[191] These are (followed by ranking) NSPCC (9), MacMillan Cancer Relief (10), Barnardo's (11), British Red Cross Society (13), Save the Children Fund (14), Marie Curie Cancer Care (15), Help the Aged (16), SCOPE (18) and Christian Aid (19) (Charities Aid Foundation, above n 106 at 14).

intangible services include academic and physical education, the provision of care homes and mental health care, and social housing.[192]

(2) Redistribution of wealth

A significant amount of organised civil society is dedicated to facilitating the transfer of resources from donors, who purchase goods and service, to beneficiaries, who consume them.[193] This is reflected in the fact that two of the four heads of charity focus upon redistribution of wealth: the relief of poverty and, to a lesser extent,[194] the advancement of education; it is also significant that twelve of the top twenty fundraising charities are wholly or partly concerned with wealth redistribution in some form.[195] We should also note at this juncture the social housing sector, which facilitates the redistribution of wealth by providing accommodation, through various means,[196] to those whose 'personal financial constraints and social vulnerabilities' prevent them from renting or purchasing property in the private sector.[197]

The reason for such a strong CSO presence in this arena is due to the information asymmetry which arises from the fact that the donor is not the beneficiary. Whilst it

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[192] Where a CSO operates simply to provide accommodation and nothing more, no intangible services will necessarily be involved; accordingly social housing is better dealt with under the discussion of the distribution of wealth (see below at 89 - 90). However, it merits inclusion here as a number of housing associations undertake social care, which will involve intangible service provision (see Kendall, above n 110 at 140).

[193] See generally Possett, J. and Sandler, T., 'Transfers, Transaction Costs and Charitable Intermediaries' (1988) 8 *International Review of Law and Economics* 145.

[194] Under the current law, fee-paying schools are eligible for charitable status, yet there is no redistribution of wealth inherent in their activities – they might more naturally be classed as providers of complex personal services (see previous paragraph). Proposals for reform have suggested that fee-paying schools wishing to obtain charitable status should be required to offer scholarships or make their facilities available to neighbouring non-fee-paying schools (NCVO Charity Law Reform Advisory Group, *For the public benefit?* (London, NCVO, 2001), para 4.3.8; Prime Minister's Strategy Unit, above n 161, para 4.26), implicitly recognising the significance of wealth redistribution in civil society activity.

[195] These are (followed by ranking): Oxfam (4), British Heart Foundation (5), Salvation Army (8), NSPCC (9), MacMillan Cancer Relief (10), Barnardo's (11), British Red Cross Society (13), Save the Children Fund (14), Marie Curie Cancer Care (15), Help the Aged (16), SCOPE (18) and Christian Aid (19) (Charities Aid Foundation, above n 106 at 14). All of these charities are concerned, to a greater or lesser extent, with applying donations for the benefit of others.

[196] On these, see the Housing Act 1996, ss 2(2), 2(4).

[197] Kendall, above n 110 at 140.

may be possible for the beneficiary to evaluate the quality of the service he receives, although this will not be the case if the service provided is intangible,[198] it will usually be difficult for this information to be communicated to the donor. As with public goods, regulation of the market to resolve the deficit would be stymied by lack of post-delivery monitoring, and so again donors turn to organised civil society as the most trustworthy option.

An alternative analysis, suggested by Hansmann,[199] is that there is an implicit loan arrangement between CSOs and beneficiaries, whereby goods and services are provided in expectation of 'voluntary payback' at a point in the future when the beneficiaries are themselves in a position to make donations.[200] Payback could be coerced through a combination of moral instruction during the actual service provision followed by pressure from beneficiary-targeted fundraising campaigns. There is no available empirical research showing the proportion of CSO income which consists of ex-beneficiary donations (it may be difficult to obtain accurate statistics relating to the origins of donations, given that many gifts to CSOs are anonymous), but some informal support for this theory may be found in the education context with the prevalence of alumni associations designed to encourage ex-beneficiaries to donate to the institutions which schooled them.

It is interesting to note from a regulatory point of view that the redistribution of wealth can be an end in its own right and also the means by which another civil society function is achieved. For example, all the charities listed above as examples of providers of intangible services rely on donations from non-beneficiaries and thus their activities contribute to wealth redistribution,[201] even though this may not be their primary purpose. We should note, however, that not every CSO that relies on donations will redistribute wealth in any meaningful sense – it may be that an organisation's donors are also its users, as is typically the case with CSOs that promote high art.[202]

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[198] On which, see above at 88 - 89.
[199] Hansmann (1986), above n 31 at 70.
[200] Hansmann (1987), above n 31 at 30; Hansmann (1986), above n 31 at 70.
[201] Above n 191.
[202] See further below at 97.

E. FACILITATION OF POLITICAL ACTION

The political function of organised civil society is, somewhat ironically, a politically controversial one. The value of CSOs' generally engaging in political action is explicitly recognised in several policy statements of the post-1997 Labour governments,[203] but there is a marked contrast in the state's attitude towards charities. Under existing law, charities may not have a political purpose,[204] even if it otherwise falls under one of the four heads of charity.[205] Charity Commission guidelines permit charities to carry out political activity in furtherance of their non-political charitable objects, but only insofar as this is 'ancillary' to the rest of their customary activities.[206] Despite the disparity between CSO government policy and charity law, both the Prime Minister's Strategy Unit report[207] and the government's response[208] recommend that these restrictions remain in place.[209] It would be inappropriate at this juncture to consider the many abstract arguments for and against freedom of political speech and association generally;[210] rather, we shall consider the specific roles played by organised civil society in this arena. CSO political activity can be split broadly into overlapping functions: (i) the advocacy of minority ideas, (ii) the accountability of the state and (iii) the facilitation of pluralism.

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[203] See in particular: Home Office, *Getting it Right Together: Compact on Relations between Government and the Voluntary and Community Sector in England* (London, HMSO, Cm 4100, 1998), para 8.6; Prime Minister's Strategy Unit, above n 161, para 4.52

[204] *De Themmines* v *De Bonneval* (1828) 5 Russ 288; *Bowman* v *Secular Society Ltd* [1917] AC 406; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31; *McGovern* v *Attorney-General* [1982] Ch 321. A political purpose is defined by Slade J in *McGovern* as being one which aims to secure a change in the law, or reversal of government policy, of any country, or which promotes a particular political party (at 340).

[205] *McGovern*, above n 204 at 340 *per* Slade J.

[206] Charity Commission, above n 170, para 23.

[207] Above n 161 under the recommendation following para 4.56.

[208] Home Office, *Charities and Not-for-Profits: A Modern Legal Framework* (London, Home Office, 2003), para 3.37.

[209] The only concessions to increasing political action are recommendations (i) that the Commission guidelines state clearly the type of activities which charities may engage in, as opposed to merely emphasising those which are prohibited and (ii) that the guidelines should also differentiate between the type of activities which are prohibited by law and those which are discouraged by the Commission but have no adverse regulatory consequences, for example, the potential loss of charitable status (Prime Minister's Strategy Unit, above n 161 under the recommendation following para 4.56; approved by Home Office, above n 208, para 3.37).

[210] For a detailed analysis see Barendt, E., *Freedom of Speech* (Oxford, Clarendon Press, 1987), especially chs 1 (on free speech generally), 5 (on political speech) and 10 (on freedom of association).

(1) Advocacy of minority interests

One of the key functions of organised civil society is the so-called 'pressure group function',[211] whereby CSOs act as platforms for the advocacy of minority groups' interests. These minority groups will typically represent the socially disadvantaged – for example, disabled rights groups such as the British Council of Disabled People, or human rights groups such as Amnesty International. However, CSOs also enable other minority interests to be voiced – for example, think tanks allow political ideologies other than those of the current government to be advanced.[212] The dissemination of minority viewpoints is not only of benefit to members of the minority in question, but also to the wider public. First, it encourages the tolerance of minority ideas by the majority.[213] Second, it facilitates specialist involvement in 'problem identification and agenda-setting',[214] creating what 6 and Randon refer to as a 'market place of ideas' to assist policymakers.[215] These ideas should also be all the more robust by virtue of the fact that the proliferation of conflicting ideas ensures that citizens are routinely 'challenged and forced to defend their views'.[216]

Market failure

The reasons why minority groups look to organised civil society, and not the private or public sectors, is because minority interest advocacy is analogous to public goods in that the benefits are nonrivalous and nonexcludable.[217] Unlike public goods, however, the benefits are only nonrivalous and nonexcludable within the boundaries of the minority group in question, rather than the public at large. Because of these qualities, minority interest advocacy will typically be unable to yield a profit, for, as with public

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[211] Kendall, J. and Knapp, M., 'A loose and baggy monster: boundaries, definitions and typologies' in Davis Smith, J., Rochester, C. and Hedley, R. (eds.), *An Introduction to the Voluntary Sector* (London & New York, Routledge, 1995) at 67.
[212] Think tanks are particularly noteworthy, as political bias has not prevented a number from registering as educational charities – for example, Demos (Registered Charity No. 1042046).
[213] 6, P. and Randon, A., *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Aldershot, Dartmouth, 1995) at 132 – 133.
[214] Saidel, above n 131 at 342.
[215] 6 and Randon, above n 213 at 135.
[216] Barendt, above n 210 at 9.
[217] See above at 62 - 63.

goods provision, there will always be a strong incentive for members of the minority group to free ride.[218]

Furthermore, as with many public goods and intangible private services, the complex nature of the service being provided means it will often be difficult to evaluate the success of any given campaign. For example, let us imagine that campaign group *a* wants the government to implement policy *b*. If group *a* lobbies the government but the government implements policy *c* instead, this will not necessarily be a reflection of the quality of group *a*'s campaign (although it might be), as behind every policy decision lies any number of factors which need to be taken into account when arriving at a decision. On the other side of the coin, if the government does implement policy *b*, it does not necessarily follow that group *a*'s campaign was a contributory factor (although it may have been). Difficulties of evaluation will also arise where a campaign is less targeted than the above example – for example, if its purpose is to 'raise public awareness' rather than effect a specific policy change. The consequence of these difficulties in evaluating the quality of advocacy is that minority groups will be drawn towards the most trustworthy service provider, which we have already noted is organised civil society.[219]

It is interesting to note that the lack of information regarding the success of a campaign may be ameliorated in practice by the threat of judicial review. Although there is no general rule that the reasons for a public body's decision must always be given,[220] lack of reasons may leave a decision open to a challenge of irrationality if the 'known facts and circumstances appear to point overwhelmingly in favour of a different decision'.[221] Also, the context in which a decision is made may be such that fairness requires reasons to be given – for example, where an existing policy is supplanted by another[222] or where the decision determines an individual's 'civil rights and obligations'.[223] Furthermore, even in those situations where reasons are not required *per se*, reasons

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[218] See above at 63.
[219] See above at 65 - 68.
[220] *R v Home Secretary, ex parte Doody* [1994] 1 AC 531; *R v Minister of Defence, ex parte Murray* [1998] COS 134.
[221] *R v Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525 at 540 *per* Lord Keith. See below Ch 8 at 260 - 262.
[222] *R v Home Secretary, ex parte Urmaza* [1996] COD 479. See H. Wade and C. Forsyth, *Administrative Law* (Oxford, OUP, 2000) at 517 – 518.

must be given to the court if leave to apply for judicial review is granted.[224] The result of this is likely to be that in practice, decision-makers will give reasons as a matter of course. However, it has been suggested that over time decision-makers learn to 'play the game' and as a matter of course declare that certain factors were taken into account when reaching a particular decision, regardless of whether this is an accurate reflection of the decision-making process.[225] Problems may also arise if a campaign is targeted at the private sector rather than government - unless a private organisation is carrying out a public function[226] these rules will not apply.

Role of civil society

We have noted that a democratic government is unable to cater effectively for the public goods demands of minority groups because this would conflict with its underlying theoretical basis to give effect to the wishes of the majority.[227] Conversely, there is no inherent problem with a democracy providing some state mechanism to facilitate the advocacy of minority interests and enable attention to be drawn to them in policy formulation and other decision-making processes. Nevertheless there are a number of reasons to suggest that it may be more appropriate to utilise CSOs – namely, the fact that they are, in theory, easy to form, efficient and expert. We have already considered these features of organised civil society in detail elsewhere.[228]

(2) Accountability of government

One of the important effects of organised civil society's pressure group function is that it contributes towards the accountability of government.[229] Because CSOs have the potential to develop expertise in their chosen field,[230] they are well-positioned to

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[223] Human Rights Act 1998, ss 3 & 6; ECHR, art 6(1).
[224] *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941.
[225] Of course, this can work both ways – a decision maker may state that he has taken *x*, *y* and *z* into account when in fact his mandate was to take into account only *x* and *y*.
[226] On which, see above Ch 2 at 39 – 40 and below Ch 5 at 163 - 164.
[227] Although we have already considered the limitations of this in practice (see above at 71).
[228] See above at 73 - 78.
[229] See Saidel, above n 131 at 342; Young, above n 56 at 155 – 156.
[230] See above at 76 - 78.

evaluate government policies and act as 'watchdog',[231] providing a 'valuable check and balance' on the actions of the state.[232] This can take effect in two ways. First, CSO feedback may be requested and recognised by the state, e.g. through formal mechanisms such as consultation processes.[233] Second, CSOs are able to disseminate their feedback to the general public and thereby publicly 'prod' the government into rethinking or justifying a particular policy decision.[234] The result is, as Blair notes:[235]

> a constant flow of citizen inputs to the state, which, being continually reminded of what its citizens want, finds it difficult to wander too far from those wishes. ... [and] discovers itself having to accommodate conflicting voices in such ways that it cannot surrender to any one voice or small coterie of voices.

This is particularly important when we consider the tendency of democratic governments to pursue the interests of those groups with the loudest voices rather than those of the majority.[236] It is important to bear in mind, however, that, despite their expertise and supposedly 'independent voice',[237] there may be temptation for individual CSOs to misrepresent or distort the implications of policy decisions in order to further their objectives. This is an issue to which we shall return later.[238]

(3) Pluralism and civic involvement

Organised civil society's participation in the political arena facilitates pluralism and citizen involvement in society.[239] This function has been recognised officially,[240] and

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[231] Lloyd, P., 'The Relationship Between Voluntary Associations and State Agencies in the Provision of Social Services at the Local Level' in Anheier and Seibel, above n 34 at 244.
[232] NCVO Charity Law Reform Advisory Group, above n 194, para 2.2.5.
[233] See Saidel, above n 131 at 342.
[234] Young, above n 56 at 151. See also Jenkins, J., 'Nonprofit Organizations and Policy Advocacy' in Powell, above n 31 at 307.
[235] Blair, H., 'Donors, Democratisation and Civil Society: Relating Theory to Practice' in Hulme and Edwards, above n 123 at 29.
[236] See above n 81 and associated text. The loudest voices will typically be those of private industries or individual private business with sufficient capital to devote considerable sums of money to lobbying the government.
[237] Saidel, above n 131 at 343; see also above Ch 2 at 50 - 51.
[238] See below Ch 4 at 129 - 131.
[239] See Anheier, above n 103 at 69; Blair, above n 235 at 28; Dunn, A., 'Shoots among the Grassroots: Political Activity and the Independence of the Voluntary Sector' in Dunn, above n

has been described as the 'most attractive' justification for freedom of political expression generally.[241] By providing minority groups with the opportunity to represent their interests, organised civil society enables 'previously marginalised' groups to mobilise and play an active part in civic affairs.[242] This in turn encourages self-fulfilment through autonomy and self-determination, which we consider in detail below.[243] Furthermore, it has been suggested that, by facilitating the creation of many assorted interest groups with diverse but overlapping interests, organised civil society encourages citizens to affiliate themselves with many different groups simultaneously.[244] This may discourage the polarization of interest groups with accentuated ideological differences, which itself may jeopardise citizen co-operation and the tolerance of the ideas of others.

F. PROVISION OF CULTURAL SERVICES

The inability to generate a profit is not the exclusive domain of the public good. In the realm of private goods, those activities which fall under the banner of 'high culture' also suffer from this problem,[245] and as a consequence they are frequently provided by organised civil society rather than the market. There have been a number of attempts to explain civil society activity in this arena. On one level it could be argued that there is an intrinsic indirect public benefit to society as a whole (of a nonexcludable and nonrivalous kind) in the provision of cultural services,[246] and that civil society presence in this arena can consequently be explained purely by reference to public goods. However, we have already noted that this approach towards civil society activity and the provision of public goods is unsatisfactory as it fails to differentiate CSO activity from that undertaken by the public and private sectors.[247] Alternatively,

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87 at 144; Klingelhofer, S., and Kendall Frye, J., *Global Perspectives on Not-for-Profit Law* (www.icnl.org, International Center for Not-for-Profit Law, 1997) at 1.

[240] United Nations System of National Accounts, para 4.55.

[241] Barendt, above n 210 at 20.

[242] Blair, above n 235 at 28.

[243] See below at 98 - 105.

[244] Blair, above n 235 at 28.

[245] DiMaggio, above n 72 at 195.

[246] Such as the generation of prestige for a geographic area, or the enhancement of the 'cultural experience' of those who do not benefit directly through 'processes of cultural stimulus and transmission' (Hansmann, H., 'Nonprofit Enterprise in the Performing Arts' (1981) 12 *Bell Journal of Economics* 341 at 342).

[247] See above at 83 - 84.

although many cultural CSOs charge their users for their services, we might expect that as many are also funded in part by donations,[248] they are concerned with facilitating the redistribution of wealth.[249] However, this explanation is also problematic in that in practice it tends not to be the economically disadvantaged who make use of cultural services; rather it is the 'well-heeled';[250] also, donors tend to be the ones who purchase the services.[251]

The better analysis is that of Hansmann, who suggests that in order to provide certain cultural services it is necessary to engage in 'voluntary price discrimination'[252] with 'some consumers agree[ing] to pay more than others for the same service'.[253] The reason for this is to do with the relationship between the fixed costs and incremental costs of service production. Individual ticket prices for a cultural event must reflect the fact that once the event is held, the cost of allowing one more consumer to attend (i.e. the 'incremental' cost) is virtually nonexistent.[254] However, in order to hold the event there will be a large number of unavoidable production costs which will be unaffected by the number of consumers who purchase a ticket (i.e. they are 'fixed') – for example, the cost of hiring actors or commissioning paintings remains constant regardless of whether the event will ultimately attract one patron or a thousand. This is exacerbated by the fact that demand is such that cultural events are generally unable to attract enough consumers to cover the total costs of production.[255] Consequently, if a cultural organisation was dependent on ticket sales alone, it would be unlikely to be able to mount many, if any, productions.

The solution to this problem is simple: some consumers voluntarily pay more for their tickets than others, despite the fact that they receive the same utility as those consumers who do not, for they are aware that if they do not future productions would not be possible.[256] This is achieved by making a donation to the organisation in

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[248] Hansmann, above n 246 at 341 – 342.
[249] See above at 89 – 90.
[250] Hansmann, above n 246 at 342.
[251] Hansmann, above n 246 at 342.
[252] Hansmann, above n 246 at 343; Hansmann (1986), above n 31 at 69.
[253] DiMaggio, above n 72 at 202.
[254] Hansmann notes that this is only true up until the point when the venue of a particular cultural event reaches capacity (above n 246 at 343).
[255] Hansmann, above n 246 at 343.
[256] Hansmann, above n 246 at 344.

addition to purchasing a ticket. The reason why CSOs dominate the provision of cultural services is therefore that they are once more the most trustworthy option when faced with the information asymmetry which will inevitably result.[257] Of course, where consumers are aware that others are willing to pay more for their tickets, there will always be some who are tempted to free-ride, which would necessitate those few good souls donating even more money in order to secure future productions.

G. FACILITATION OF SELF-DETERMINATION

Organised civil society can play a significant role in the facilitation of the 'self-determination' of its participants, by which we mean the development of an independent and self-directed personality. The nurturing of such a personality is a central theme in much philosophical writing and is necessary to satisfy the human desire for 'power, emotional associations, autonomy and … mutual support'.[258] It also plays a part in counteracting the 'dirigisme of the state'.[259] There are three ways in which organised civil society is able to contribute to self-determination: (i) by providing an outlet for the expression of altruism, (ii) by providing a vehicle for mutual support and (iii) by providing an outlet for ideological expression.

(1) Altruistic expression

The idea that organised civil society is an important vehicle for altruistic expression is well-documented in the literature[260] and affirmed in empirical research.[261]

Charity and philanthropy

Although the virtues of charity and philanthropy are sometimes treated as interchangeable,[262] they are in fact quite distinct: charity is benevolence towards those

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[257] See above at 65 - 68.
[258] Anderson, J. and Moore, L., 'The Motivation to Volunteer' (1978) 7 *Journal of Voluntary Action Research* 120 at 120
[259] Knapp *et al*, above n 102 at 209.
[260] See e.g. Anderson and Moore, above n 258 at 120; Anheier, above n 103 at 68; Clohesy, W., 'Altruism and the Endurance of the Good' (2000) 11(3) *Voluntas* 237; Gassler (1990), above n 6 at 143; Home Office, above n 104, para 1.4; Rose-Ackerman, above n 50 at 121; United Nations System of National Accounts, para 4.55.
[261] James and Rose-Ackerman, above n 28 at 60.

in need; philanthropy is benevolence towards mankind more generally.[263] The tendency to treat the two as one and the same is perhaps the result of the current definition of legal charity, which encompasses both virtues. For example, a charity which relieves poverty by running a soup kitchen must by definition limit its class of beneficiaries to those who are in need,[264] and thus facilitates the charitable intentions of its trustees, volunteers and donors. A charity which advances education by running an art gallery open to the general public, on the other hand, will not necessarily benefit the needy, but is able to facilitate philanthropic intention by providing a benefit to all the members of the wider community who choose to avail themselves of its facilities.[265]

Interestingly, if legal charity were concerned solely with facilitating charitable and philanthropic intentions, then the weak test of public benefit which applies to those charities which relieve poverty could be justified on the ground that this head of charity is the only one which is necessarily concerned, in terms of direct benefit, with charitable, rather than philanthropic, intention, and so it should not be necessary to ensure a cross-section of society was able to benefit. In Australia, the Charities Definition Inquiry recommended that altruism be a requirement of all legal charity and be factored into the public benefit test,[266] although this suggestion was not adopted by the now defunct government reform package.[267] We should also note that under English law the motives of a donor are wholly irrelevant when deciding whether a gift is charitable – it is sufficient that the gift is for a valid charitable purpose and satisfies

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[262] See Chesterman, M., *Charities, Trusts and Social Welfare* (London, Weidenfeld and Nicolson, 1979) at 2; Gardner, J., 'The Virtue of Charity and its Foils' in Mitchell and Moody, above n 165 at 17.

[263] See generally Gardner, above n 262.

[264] Although this has been held to include those who 'have to "go short"' (*Re Coulthurst* [1951] Ch 661 at 666 *per* Lord Evershed MR).

[265] Of course, at an abstract level, all purposes and activities which fall within the framework of legal charity can be said to facilitate philanthropic intention by virtue of the notion that all charitable pursuits result in an indirect benefit to society at large. See above at 82 - 83.

[266] Charities Definition Inquiry, above n 149 Chapter 13, recommendation 7. However, the reference to altruism seems largely to have been for appearance's sake, as the Inquiry considered that 'while the concept of altruism needs to be emphasised, it is not necessary to define the term any more precisely for the purposes of clarifying public benefit … [as] the concept of altruism is sufficiently understood within the community' (at 125).

[267] The Charities Bill 2003, abandoned in May 2004, contained no mention of altruism.

the public benefit requirement[268] – although they may be relevant when deciding whether a failed gift is applied to another charitable object under the doctrine of *cy près*.[269]

Private altruism and public altruism

In addition to the distinction between charity and philanthropy, it is also useful to distinguish between benevolence (whether directed towards the needy or wider society) for its own sake (which we might term 'private altruism') and benevolence which is motivated by the 'spirit of ostentation'[270] and 'lure of honour'[271] (which we might term 'public altruism'). By private altruism we do not mean that the charitable or philanthropic intent must necessarily be 'pure' in the sense that the donor or volunteer receives no utility whatsoever from his participation in organised civil society;[272] rather, we mean that his reason for participation is not dependent on external factors. Instead, the motivation is introverted in nature – either a feeling of personal elevation or satisfaction, like that of a 'good cup of coffee',[273] or a 'relief of guilt',[274] that results from the benevolence. Schervish has also noted that there may be more pragmatic reasons for favouring private altruism, such as the desire to avoid stigmatising beneficiaries or to deflect claims of attention seeking.[275] Public altruism, by contrast, is dependent on external factors for its utility to the participant. This is

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[268] *Hoare* v *Osborne* (1886) LR 1 Eq 585; *Re King* [1923] 1 Ch 243; *Davies* v *Hardwick* [1999] CLY 9454.

[269] Where a gift fails *ab initio*, rather than after it has already be dedicated to charitable purposes, there must be a general or paramount charitable intention on the part of the donor, rather than a specific intention to benefit the recipient charity (*Re Lysaght* [1966] Ch 191 at 202 *per* Buckley J). Where there is no such intention, *cy près* will not apply and the gift will go back to the donor on resulting trust.

[270] Marcus Tullius Cicero, *De Officiis* (translated by Miller, W., Cambridge, Massachusetts, Harvard University Press, 1913) Book 1.14, para 44.

[271] Cicero, *De Officiis* Book 1.14, para 44, alternative translation in Hands, A., *Charities and Social Aid in Greece and Rome* (London, Thames and Hudson, 1968) at 49; noted in Smith, J. and Borgmann, K., 'Foundations in Europe: the Historical Context', in Schlüter *et al*, above n 103 at 4.

[272] Indeed, many commentators doubt whether 'pure' altruism in this sense can ever actually exist – see e.g. Anderson & Moore, above n 260.

[273] Brown, E., 'Altruism Towards Groups: The Charitable Provision of Private Goods (1997) 26 *Nonprofit and Voluntary Sector Quarterly* 175 at 175.

[274] Kingma, B., 'Public good theories of the non-profit sector: Weisbrod revisited' (1997) 8 *Voluntas* 135 at 138.

interesting from a regulatory perspective, as it means that, unlike private altruism, regulation may be able to influence the external factors in order encourage increased altruism and generate further resources for the sector.

It is perhaps worth noting that the public attitude to private and public altruism seems to favour the former, with examples of the latter frequently being greeted with a degree of cynicism; indeed, Cicero described this form of benevolence 'akin to hypocrisy'.[276] This is of interest for regulation purposes for two reasons: (i) because it is dependent on external factors, we could style regulation to reduce, rather than encourage, benevolence of this kind, and (ii) it raises the issue of the extent to which the legal framework of organised civil society should reflect public opinion. It is also important to note, however, that whilst public altruism may be greeted with cynicism, there may be equally unattractive reasons for remaining anonymous, such as the desire to avoid being overwhelmed by further requests for money or simply to 'deflect the embarrassment of being a philanthropist'.[277]

(2) Mutual support

The second way in which organised civil society facilitates self-determination is by enabling the provision of mutual support.[278] Mutual support lies uneasily, at least in theory, with charity and philanthropy, for although both result in the elevation of others, the first two are motivated by benevolence, whereas mutual support stems from the desire to help one's self and is thus the 'very opposite of altruism'.[279] In practice, CSO activity exhibits differing degrees of mutuality and on occasion may sit happily alongside charitable and philanthropic activities. The inclusion of CSOs based on mutuality in organised civil society is also controversial as they lack the characteristic of non-profit distribution,[280] which many focus upon when defining the sector.[281] In fact, they have grown in prominence over the past forty years and some argue they are

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[275] See generally Schervish, P., 'The sound of one hand clapping: the case for and against anonymous giving' (1994) 5(1) *Voluntas* 1, particularly at 8 and 10 – 11.
[276] Above n 271, para 44.
[277] Schervish, above n 275 at 5 – 6.
[278] See Anderson and Moore, n 260; Kendall & Knapp, above n 211 at 67; United Nations System of National Accounts, para 4.55.
[279] Luxton, above n 12 at 191.
[280] See above Ch 2 at 53 - 54.

now the dominant force in organised civil society.[282] Furthermore, the non-profit distribution requirement itself betrays the Anglo-American focus of much civil society theory: there is a strong tradition of mutuality in Europe, where CSOs based on 'various forms of solidarity' constitute a distinct sub-sector operating alongside nonprofits.[283] Like other elements of organised civil society, the mutual sector is diverse, consisting of organisations ranging from support networks pursuing social aims to building societies and other financial institutions.

Support groups

An important element of mutuality within civil society is the self-help support network.[284] By creating 'networks and relationships that connect people to each other',[285] CSOs enable socially-disadvantaged citizens to associate with each other for the benefit of all concerned. The advantage of these associations is that they have the

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[281] See above Ch 2, nn 4 & 5 and associated text.

[282] See e.g. Deakin, N., 'Putting narrow-mindedness out of countenance – the UK voluntary sector in the new millennium' in Anheier, H. and Kendall, J. (eds.), *Third Sector Policy at the Crossroads An international nonprofit analysis* (London & New York, Routledge, 2001) at 37; also Kendall, J., Knapp, M., Paton., R., and Thomas, A., 'The "Social Economy" in the UK' in Defourny, J., and Monzon Campos, L. (eds.), *Economie Sociale - The Third Sector: Cooperative, Mutual and Nonprofit Organizations* (Brussels, de Boeck, 1992); Kendall, J., Knapp, M., Paton., R., and Thomas, A., 'The Social Economy of the United Kingdom' (1993) 46 *Revue des Etudes Cooperatives, Mutualistes et Associatives* 51. On recent efforts to quantify these organisations and their place within organised civil society, see Kendall, above n 110, Ch 2.

[283] Evers, A., and Laville, J., 'Defining the Third Sector in Europe' in Evers, A., and Laville, J. (eds.), *The Third Sector in Europe* (Cheltenham, Edward Elgar, 2004) at 36. This is referred to in the literature as the 'social economy': on which see generally Evers and Laville, *ibid*; International Centre of Research and Information on the Public and Cooperative Economy (CIRIEC), *The Enterprises and Organzations of the Third System: A Strategic Challenge for Employment* (Liege, CIRIEC, 2000). On specific jurisdictions see: Pestoff, V., 'The Development and Future of the Social Economy in Sweden' in Evers and Laville, *ibid*; Ibsen, B., 'Changes in Local Voluntary Associations in Denmark' (1996) 7 *Voluntas* 160; Klausen, K., and Selle, P., 'The Third Sector in Scandinavia' (1996) 7 *Voluntas* 99; Chanial, P., and Laville, J., 'French Civil Society Experiences: Attempts to Bridge the Gap Between Political and Economic Dimensions' in Evers and Laville, *ibid*; Archambault, E., 'Defining the Nonprofit Sector: France' (www.jhu.edu/~ccss/pubs/pdf/france.pdf, Johns Hopkins Comparative Nonprofit Sector Project, 1993); Laville, J., and Nyssens, M., 'Solidarity-Based Third Sector Organizations in the "Proximity Services" Field: A European Francophone Perspective' (2000) 11 *Voluntas* 67; Thomas, A., 'The Rise of Social Solidarity Cooperatives in Italy' (2004) 15 *Voluntas* 243; also note Kendall *et al*, above n 282 in the UK context.

[284] On which see generally Borkman, T., *Understanding Self-Help / Mutual Aid: Experiential Learning in the Commons* (Piscataway, Rutgers University Press, 1999).

[285] Boris, above n 134 at 18.

potential to avoid the negative aspects of assistance based on the altruism of others, which can be seen as stigmatising[286] and demoralising by virtue of the fact that the benefit is dependent on the benevolence of those who are not similarly disadvantaged. Self-help also gives citizens the opportunity to take control of their situation and thus provide psychological elevation as well as material support. The most obvious example of such a support network is Alcoholics Anonymous.[287]

Support groups and charitable status

Where the 'support' in question is financial, for the most part, the existing law conforms to the idea that self-help is anathema to altruism, and a CSO that provides financial assistance to its members in return for subscriptions will normally be ineligible for charitable status. Certainly it is likely that self-help for its own sake cannot be charitable in English law, as it does not fall under any of the four heads of charity,[288] although it is now a recognised charitable purpose in Australia by virtue of s 4 of the Extension of Charitable Purposes Act 2004. There is also a problem when a CSO uses self-help as the means to pursue an exclusively charitable purpose, because by forming a network with each other its participants necessarily create a nexus between themselves, and the organisation will thus fail to satisfy the public benefit test under the second, third and fourth heads of charity.[289] However, the 'weak' public benefit test under the first head of charity means that those self-help groups that operate for the relief of poverty will be legally charitable.[290]

However, if the self-help element of a CSO's activity is of a non-pecuniary nature it will not in itself be a bar to charitable status, despite the supposed ideological conflict

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[286] See e.g. Schervish, above n 275 at 10 –11.

[287] Alcoholics Anonymous is a particularly interesting CSO, as it lacks one of the key characteristics of a CSO identified earlier (see above Ch 2 at 51 - 52) by virtue of the fact that it is informal, having 'no governing officers, no rules or regulations' (Alcoholics Anonymous, *Structure of A.A. General Services in US / Canada* (www.alcoholics-anonymous.org.uk/em24doc5.html, Alcoholics Anonymous, 2003 web version), para 1).

[288] See Luxton, above n 12 at 191.

[289] See e.g. *Re Hobourn's Aero Components Ltd's Air Raid Distress Fund* [1946] 1 Ch 194, where a trust to relieve those who were suffering 'damage and distress' from air raids ('in itself a good charitable object' (at 202 *per* Lord Greene MR)) was held not to be charitable as only those who had made contributions to the fund were eligible to benefit.

[290] *Spiller v Maude (Note)* (1886) 32 ChD 158. See above Ch 2 at 43.

between mutuality and altruism. It is possible to satisfactorily combine the two in practice, and so long as an organisation is 'substantially altruistic',[291] if its purposes are exclusively charitable and public benefit is satisfied, it will be charitable.[292] The simplest way in which such a combination can take effect is where an organisation relies on donations and a volunteer workforce for administration purposes but utilises a support network as a practical means of pursuing its charitable purpose – for example, Gingerbread (An Association for One Parent Families) Ltd.[293] Of course, where the beneficiaries of a charity are also engaged in its administration at trustee level, care must be taken to avoid conflicts of interest and ensure that decisions are taken solely in the interests of the organisation.[294]

Mutuality and economic benefits

At this juncture it is prudent to discuss those mutual organisations which operate to provide economic or commercial benefits for their members. Where this is the sole purpose of an organisation, then it is likely that we would consider the organisation to fall outside the scope of organised civil society. The exclusive pursuit of economic or commercial benefits would suggest the organisation falls squarely within our definition of the private sector.[295] However, where an organisation pursues these activities (i) as a means to carrying out a wider social objective (for example, trade unions) or (ii) in conjunction with carrying out a wider social objective (for example, social enterprises) then there is an argument that we should include them in our map of organised civil society. We shall return to consider this issue in detail in Chapter Five.[296]

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[291] *National Deposit Friendly Society Trustees v Skegness UDC* [1959] AC 293 at 315 *per* Lord MacDermott.

[292] At the time of writing, there are 158 registered charities whose names or stated objects include the words 'self-help' (Central Register of Charities, www.charity-commission.gov.uk).

[293] Registered Charity No. 282512.

[294] See generally Charity Commission, *CC24: Users on Board: Beneficiaries who become trustees* (London, Charity Commission, 2000).

[295] See above Ch 2 at 39.

[296] See below Ch 5 at 203 - 204.

(3) Ideological expression

The final way in which organised civil society can facilitate self-determination is by providing platforms for ideological expression.[297] We have already noted the significance of political action and the role CSOs can play in enabling this. However, there are innumerable belief systems outside the political arena and it is equally important for the autonomy of the individual that citizens are free to express these as well. As religious beliefs are the most common form of ideology, we can include those CSOs which advance religion under this heading.[298]

H. FACILITATION OF ENTREPRENEURSHIP

The final function of organised civil society is illustrated by the 'energetic dedication of its numerous participants',[299] and explains further why it is that the sector is able to attract the actors needed to take control of the provision of public goods, complex private services and cultural services. The various theories detailed above explain why there is a demand for certain goods and services that is not satisfied by the public and private sectors,[300] and they also explain why organised civil society is the appropriate vehicle, but they fail to consider in any detail why potential suppliers are drawn to these particular products.[301] Several commentators have suggested that the reason why a career within civil society is attractive is because it provides an environment which is amenable to entrepreneurship.[302] There are three reasons for this: the freedom to innovate, the ability to retain control of a project and the intangible notion of civil society 'ethos'. We shall examine each in turn.

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[297] See James and Rose-Ackerman, above n 28 at 60; Rose Ackerman, above n 50 at 126.
[298] See Boris, above n 134 at 20.
[299] Levitt, above n 32 at 57.
[300] See above at 63 - 65, 70 - 72.
[301] Legorreta, J. and Young, D., 'Why Organizations Turn Nonprofit: Lessons from Case Studies' in Rose-Ackerman, above n 2 at 196.
[302] See particularly Young, D., 'Entrepreneurship and the Behaviour of Nonprofit Organizations: Elements of a Theory' in Rose-Ackerman, above n 2.

(1) Innovation

The desire to innovate – that is, break new ground in a chosen industry – is at the heart of entrepreneurship. Schumpeter identifies five actions an entrepreneur can take in order to be innovative:[303]

> (1) The introduction of a new good – that is one with which consumers are not yet familiar – or a new quality of a good. (2) The introduction of a new method of production, that is one not yet tested by experience in the branch of manufacture concerned, which need by no means be founded upon a discovery scientifically new, and can also exist in a new way of handling a commodity commercially. (3) The opening of a new market, that is a market into which the particular branch of manufacture of the country in question has not previously entered, whether or not this market has existed before. (4) The conquest of a new source of supply of raw materials or half-manufactured goods, again irrespective of whether this source already exists or whether it has first to be created. (5) The carrying out of the new organisation of any industry.

The functions we have examined throughout this chapter suggest that in practice all five of these are characteristic of much civil society activity. We shall examine each in turn.

Introduction of a new good, method of production or supply

It is convenient to consider the first, second and fourth actions of Schumpeter's taxonomy together, as all three are concerned with supply. We have already noted that many CSOs which operate to provide market support, such as research institutions and consumer organisations, are regularly involved in the development of new goods, new methods of production and the discovery of raw materials.[304] However, probably the most significant contributions of organised civil society relate to the provision of public goods and complex private goods. In the public goods context, organised civil

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[303] Schumpeter, J., *The Theory of Economic Development* (Cambridge, Massachusetts, Harvard University Press, 1936) at 66. See also Badelt, C., 'Entrepreneurship theories of the non-profit sector' (1997) 8 *Voluntas* 162 at 164.
[304] See above at 60 - 61.

society was the first sector to provide prisons[305] and develop a transport infrastructure,[306] whilst in the context of complex private goods and the redistribution of wealth CSOs pioneered educational establishments (such as universities[307] and public libraries[308]) and hospitals.[309]

Opening of a new market

With regard to creating new markets, CSOs are regularly engaged in identifying social needs that have hitherto not formerly been recognised. At a less abstract level, organised civil society also gives entrepreneurs the opportunity to create new market opportunities. For example, Gassler suggests that in a small-sized state it might be possible for CSOs to deal with 'unemployment and inflation' and thereby establish the conditions necessary for new markets to operate.[310]

New organisation of an industry

Organised civil society has a strong history of reforming pre-existing industries. Having established the education sector in the United Kingdom, in the sixteenth and seventeenth centuries private philanthropy was responsible for a 'revolution' within

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[305] E.g. in Pennsylvania, United States, the Quaker movement was responsible for securing the introduction of incarceration as the standard response to a criminal conviction in 1682; previously the standard response had been corporal punishment (see further, United States Bureau of Prisons, *Handbook of Correctional Institution Design and Construction* (Washington DC, United States Bureau of Prisons, 1949; relevant text also online at www.notfrisco.com/prisonhistory/) under 'Pennsylvania Quakers Establish the Modern Prison System'.

[306] See Douglas, above n 3 at 13; Chesterman, above n 262 at 17. The importance of these examples of innovation is evidenced by their inclusion in the Preamble to the Statute of Charitable Uses 1601 (see above Ch 2 at 42 - 43).

[307] Although there is no agreement as to precise dates, the first two universities were founded in the twelfth and thirteenth centuries at Oxford (between 1096 and 1167 (University of Oxford, *A Brief History of the Oxford University* (www.ox.ac.uk, University of Oxford, 2003 web version), para 1)) and Cambridge (between 1209 and 1226 (University of Cambridge, *A Brief History* (www.cam.ac.uk, University of Cambridge, 2003 web version) under 'Early Records')).

[308] Lawson, J. and Silver, H., *A Social History of Education in England* (London, Methuen, 1973) at 105.

[309] See Douglas, above n 3 at 13; Chesterman, above n 262 at 17. These examples are also notable by their inclusion in the Preamble to the Statute of Charitable Uses 1601 (see above, Ch 2 at 42 - 43).

[310] Gassler (1990), above n 6 at 143. See also discussion above at 57 - 60.

the sector,[311] by switching the focus away from universities to schools with the foundation of petty schools and grammar schools.[312] The redistribution of property rights undertaken by some CSOs, for example in relation to the abolition of slavery,[313] could also be viewed as falling under this head. However, reorganisation need not be limited to those industries which already have a strong civil society presence. As we shall see in the next chapter, a number of CSOs trade in the private market and engage in competition with private enterprises.[314] This may simply be in order to raise funds for their (unconnected) charitable purposes, as will often be the case with CSOs which run shops selling donated used goods. However, some enter the private market in order to effect a reorganisation of the industry in question – for example, organised civil society has begun to infiltrate the financial sector with organisations such as The Charity Bank Ltd which offers banking services on beneficial terms to both charities and individuals as 'social investment',[315] and the Ethical Investment Association, the purposes of which are to promote and set standards for ethical investment in the sector.[316]

(2) Retention of Control

The second reason why entrepreneurs are attracted to organised civil society is said to be from the desire to retain control of organisations after their creation.[317] This desire for control has been cited as one of the reasons for organised civil society prevalence in the realm of cultural services in the United States,[318] which was the result of the newly emergent urban upper class's desire to 'define and legitimate a body of art that they could call their own'.[319]

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[311] Chesterman, above n 262 at 17.
[312] See Lawson and Silver, above n 308 at 103 – 107, especially at 104.
[313] See above at 51.
[314] See below Ch 5 at 168, 203 - 204.
[315] *Decisions of the Charity Commissioners*, 1 November 2002 at 2.
[316] For the constitution of the Ethical Investment Association see www.ethicalinvestment.org.uk under 'Constitution and Code of Conduct'.
[317] See Ben-Ner, A., 'Nonprofit Organisations: Why Do They Exist in Market Economies?' in Rose-Ackerman, above n 2 at 95; Hansmann (1987), above n 31 at 33; Legorreta and Young, above n 301 at 201. See also the discussion of relational goods above at 75.
[318] See above at 96 - 98.
[319] DiMaggio, above n 72 at 204.

Retention of control becomes an issue when an organisation wishes to raise capital. In order for a private sector venture to do this, there are generally two options - (i) borrow money from a financial institution or (ii) incorporate and sell shares in the undertaking. There are a number of problems inherent in borrowing from a financial institution. First, most will typically require some security or personal guarantee before they will agree to loan money. Not only will many entrepreneurs consider this an unacceptable personal risk, many will simply be unable to provide adequate security or guarantees. Second, there will typically be conditions attached to the loan restricting the disposal of the capital – for example, requiring it to be used for a specific purpose only[320] – which may limit the proprietors' managerial discretion. The alternative is to raise capital by incorporating the organisation and issuing shares. Although this sidesteps the problem of lack of security or guarantees, the payoff is that control of the organisation, at least in theory,[321] will vest in those who have purchased the shares.[322] By comparison, reconstituting the organisation as a CSO will enable capital to be raised by way of donation.[323] As these are gratuitous, donors do not receive any interest in the organisation in return and hence control does not shift to them. By

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[320] See *Barclay's Bank Ltd* v *Quistclose Investments* [1970] AC 567; *Twinsectra* v *Yardley* [2002] 2 AC 164.

[321] The issues of how much managerial autonomy the directors of a company should have, and to whom they should be answerable, are matters of some debate. The traditional view is that, because they are the owners, a company should be run in the interests of its shareholders: see Berle Jnr, A., and Means, G., *The Modern Corporation and Private Property* (New York, Macmillan, 1932); also Friedman, M., 'The Social Responsibility of Business is to Increase Its Profits' *The New York Times Magazine*, 13 September 1970. However, numerous other theories abound: see e.g. Dodd Jnr, E., 'For Whom are Corporate Managers Trustees' (1932) 45 *Harv L Rev* 1145 at 1154; Nader, R., Green, M., and Seligman, J., *Taming the Giant Corporation* (New York, Norton, 1976) (on the company as good citizen); O'Neill, T.,'Gender and Corporate Personhood: A Feminist Response to David Millon' (2001) *Stanford Agora* 77 (on feminist theories of corporate governance). For a general discussion of the debates see Dine, J., *The Governance of Corporate Groups* (Cambridge, CUP, 2000), Ch 1; Millon, D., 'The Ambiguous Significance of Corporate Personhood' (2001) 2 *Stanford Agora* 39. The current Labour reforms in this area acknowledge the relevance of stakeholders other than shareholders: if the reform proposals are implemented in their current form, the basic position re shareholders will be maintained (see below n 322), but directors will also have to take wider interests into account where appropriate (Draft Companies Bill, s 17 and Sched 2, para 2).

[322] Under s 309 of the Companies Act 1985, the board of directors is required to take the interests of shareholders and employees into account in determining what is in the interests of the company, where the company is solvent. Further, the general powers of management in public and private companies that are normally vested in the board of directors, are subject to directions by special resolution from the shareholders in general meeting: see e.g. the Companies (Tables A to F) Regulations 1985 (SI 1985/805), Table A, Reg 70.

establishing themselves as trustees, the original proprietors can continue to run the organisation in the manner they deem appropriate.

It is certainly true to say that CSOs are generally able to attract donations in a manner which private enterprises cannot – we have already noted the reasons for this above.[324] However, it is overly simplistic to say that, by relying on donations, the trustees of a CSO will always retain managerial control. First, there is an increasing trend for local authority and central government grants to CSOs to be highly prescriptive – for example, the Select Committee for Public Accounts recommends that CSOs in receipt of National Lottery grants should be closely monitored 'to address the risks to value for money ... such as changes to the project or improper uses of the award'.[325] Second, where a CSO is reliant on regular, large donations from a small number of benefactors, there may be strong temptation to make only those managerial decisions which are likely to be approved by the funders, so as not to jeopardise future income. Third, if a donation is advanced for a specific purpose, it may be held by the CSO (or its trustees if it has no legal personality) on trust for that purpose rather than as a gift to the CSO to be treated as an accretion to its general funds,[326] and a failure to adhere to this could result in an action for breach of trust. Finally, where a CSO raises funds through member subscriptions, its members will typically have voting rights and, accordingly, may be able to direct the trustees with regard to policy decisions – for example, the reason why the trustees of the RSPCA wished to exclude members in the dispute which culminated in the case of *RSPCA* v *Attorney General* was that the members in question were attempting to alter the organisation's policy in relation to

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[323] Legorreta and Young, above n 301 at 201.
[324] See above at 89 - 90.
[325] Select Committee for Public Accounts, *The Distribution of Lottery Funds by the English Sports Council* (London, HMSO, 1997-8), para 4(xi). See also Garton, above n 137 at 95 – 96.
[326] There are two situations when this might occur: (i) if the donor specifically states that donation is to be held on trust for exclusively charitable purposes which satisfy the public benefit test; (ii) if the donor is silent on the matter but the recipient CSO is a charitable unincorporated association (*Re Vernon's Will Trusts* [1972] Ch 300n; *Re Roberts* [1963] 1 WLR 406; *Re Finger's Will Trusts* [1972] Ch 286). One might try to argue that the courts should draw an analogy with specific-purpose loans and hold that donations for specific purposes (charitable or otherwise) should be held on *Quistclose*-style trusts until they are applied for the purposes for which they have been given (see above, n 320). However, it seems unlikely that this would happen, as the rationale behind *Quistclose* trusts is to protect creditors against organisations failing to pay back loans; donors, on the other hand, do not expect their money to be returned.

hunting.[327] Indeed, we have already noted that Ben-Ner and others have argued that in relation to those CSOs which provide relational goods, it is the right to participate in an organisation's affairs which specifically attracts consumers.[328]

(3) Civil Society Ethos

The final reason why entrepreneurs are attracted to civil society activity is best described as the characteristic spirit or 'ethos' of the sector.[329] Because non-profit distribution is one of the key characteristics of CSOs,[330] its participants must look for their utility elsewhere; typically this takes the form of prestige and the fulfilment of altruistic impulses, which we have already considered above in detail.[331]

I. CONCLUSION

This chapter has sought to highlight and explain the different theories which seek to explain the existence of organised civil society, and distil them into eight distinct social functions. It is clear that, although we identified a number of overlapping areas both in theory and in practice, each of the eight functions identified has its own distinct features and, accordingly, they cannot satisfactorily be further reduced without losing part of the picture. The first function identified, the provision of market support, is distinct from the other seven in that it is concerned with explaining how organised civil society can assist the operation of the private sector as opposed to providing consumers with an alternative to it. The second function, the provision of public goods, is explained partly by reference to the theory of contract failure, and accordingly has much in common with several other functions – we noted that this theory has also been used to explain the provision of certain private services, namely complex, intangible goods and those goods where the consumer is separated in some

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[327] See above n 136.
[328] See above at 75.
[329] See NCVO Charity Law Reform Advisory Group, above n 194, para 2.2.8; Badelt, above n 1 at 171; DiMaggio, above n 72 at 204.
[330] See above Ch 2 at 53 - 54.
[331] See above at 98 - 101. Some argue that a similar ethic exists within the public sector, on which see Plant, R. (Lord Plant of Highfield), 'A Public Service Ethic and Political Accountability' (2003) *Parliamentary Affairs* 560.

way from the person who pays for their provision. However, it is important that these remain distinct categories. This is partly because the shared theoretical rationale has led numerous commentators to categorise private goods of this nature, such as the provision of healthcare or the provision of education, as public goods, which we have shown is not the case as they are not inherently nonrivalous or nonexcludable. Also, there are other theoretical explanations for the sector's public goods provision which are inapplicable to private goods – such as the free rider issue. The provision of cultural services is also based on trust theory, but is distinct from the provision of other private goods as it does not necessarily involve either a service which cannot be adequately evaluated even after purchase, or the redistribution of wealth – where this is the case, CSO activity is better explained by consumers' voluntary price discrimination. Likewise, the sector's facilitation of political action is based partly on trust theory, but the unique nature of the advocacy role and the sector's ability to facilitate government accountability warrant detailed exposition. Lastly, the remaining two categories afford us an insight into the processes involved in the sector. Again, there is a degree of overlap between these categories, but it is useful to keep them distinct: the facilitation of self-determination is primarily concerned with explaining how the sector provides a vehicle for self-expression and the roles played by altruism and mutuality, whereas the facilitation of entrepreneurship is concerned with explaining why certain actors are prepared to go beyond merely passive engagement with the sector – for example, making donations – and move to active participation at a managerial level.

Taken together, these functions, along with the previous chapter, explain why and how CSOs operate in certain social spheres. They also hint at a number of potential weaknesses that may prevent the sector from achieving its full potential. In the next part of the thesis, we shall consider these in detail and offer a theory of civil society regulation.

PART TWO

TOWARDS A THEORY OF CIVIL SOCIETY REGULATION

CHAPTER 4

Foundations of Civil Society Regulation

A. INTRODUCTION

The previous two chapters on the constitution and social functions of organised civil society revealed (i) what we might reasonably expect the sector to achieve and (ii) various factors that might prevent the sector from achieving its potential. This chapter builds upon this analysis and considers when, and for what reasons, it may be appropriate to regulate the sector in order to minimise the effects of (ii). The first part of the chapter introduces traditional theories of regulation based on the private sector and considers their application to organised civil society. It argues that, although these theories are instructive, the structural and functional differences between CSOs and private sector firms mean that that it is inappropriate to apply them indiscriminately to the sector: certain justifications for regulation, such as the need to control monopolies, are of limited relevance whereas others, such as the resolution of information deficits, have a particular pertinence. The second part of the chapter considers whether there are other sector-specific justifications for regulating organised civil society, and argues that regulation can also be justified by reference to (i) the philanthropic failures identified in Chapter Three and (ii) the organisational characteristics identified in Chapter Two. Finally, the chapter considers the limitations of regulation with specific regard to the issues of juridification and the tension between the different justifications of regulation.

Before we begin it is important to make two sets of distinctions. The first is between those theories which seek to justify regulation and those which seek to explain it.[1] Much regulation literature is devoted to explaining the emergence of regulatory rules in a particular sphere.[2] It is not the aim of this thesis to consider why, at a pragmatic

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[1] See Blankart, C., 'Strategies of Regulatory Reform: An Economic Analysis with Some Remarks on Germany' in Majone, G. (ed.), *Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States* (London, Pinter, 1990) at 212.

[2] E.g. public interest theory, which argues that regulation is carried out in the interests of society in general and 'is likely to involve reference to' the justifications we shall consider below: see Baldwin, R., and Cave, M., Understanding Regulation Theory, Strategy, and Practice (Oxford, OUP, 1999) at 19); see also e.g. private interest theories (for a brief summary see Baldwin and Cave, ibid at 21 - 25); new institutionalism (on which see Hall, P., and

level, civil society regulation has taken certain forms in certain jurisdictions; rather, we are concerned with establishing a generic framework against which such regulation can be evaluated.[3] The second distinction we need to make is between justifications for different types of regulation. First, we can distinguish between regulation that is designed to prevent or rectify specific problems that may occur in the course of the sector's operation and regulation that is designed to encourage an already successful sector to flourish further.[4] For present purposes, we are concerned primarily with the former; the scope of the latter means that detailed analysis is outside the scope of this thesis, although we shall return to this issue briefly below.[5] Further, with regard to regulation to prevent or rectify specific problems, it is useful to delineate between three different types of problems: (i) those which apply specifically to CSOs by virtue of their structural characteristics or social functions; (ii) those which apply specifically to certain CSOs by virtue of the activities in which they are engaged; and (iii) those which apply to certain CSOs, but also to organisations in other sectors, by virtue of the activities in which they are engaged. Where a problem falls into the first category, there will be a *prima facie* argument for sector-based regulation, since the problem is one intrinsic to organised civil society. Where a problem falls into the third category, and the problem is not civil society-specific, activity-based regulation would seem more appropriate. Where a problem falls into the second category, and so is both sector-based and activity-based, then either regulatory approach would seem acceptable. The following analysis will seek to identify all three categories of problem. However, as this thesis is essentially concerned with the question of when it may be appropriate to regulate organised civil society as a whole, our primary concern is with the first category.

Taylor, R., 'Political Science and the Three New Institutionalisms' (1996) 44 Political Studies 936); network theory (on which see Börzel, T., 'Organizing Babylon – On the Different Conceptions of Policy Networks' (1998) 76 Public Administration 253); economic theories of regulation (on which see Peltzman, S., 'The Economic Theory of Regulation after a Decade of Deregulation' in Baldwin, R., Scott, C., and Hood, C. (eds.), *A Reader on Regulation* (Oxford, OUP, 1998)).

[3] See Breyer, S., *Regulation and its Reform* (Cambridge, Massachusetts, Harvard University Press, 1982) at 15: 'the details of any program often reflect political force, not reasoned argument. Yet thoughtful justification is still needed when programs are evaluated'.

[4] Some commentators suggest that regulation is by definition concerned with the former, being 'that designed to protect … [a sector] against threats to its survival' (Prosser, T., *Law and the Regulators* (Oxford, Clarendon, 1997) at 19).

B. TRADITIONAL THEORIES OF REGULATION

Before we begin to formulate a rudimentary theory of civil society regulation it is prudent first to consider existing theories of regulation. Almost all of the existing regulation literature concerns the regulation of private markets and, to a lesser extent, the regulation of the public sector. In light of the analysis in the first part of this thesis, it would be surprising if any of these theories could be mapped directly onto organised civil society with any degree of precision. In particular, much private sector regulation theory hangs on profit-maximisation, which we might expect to be incompatible with the characteristic of non profit distribution. However, in the following chapter we suggest that CSOs and private sector organisations sometimes operate in the same social sphere, and also that CSOs may absorb some of the characteristics of their private sector counterparts.[6] It would therefore be improvident to dismiss private sector theories of regulation out of hand entirely. Accordingly, the following analysis considers the relevance of these theories for organised civil society, focusing in particular on the traditional economic justifications for regulation and broader social justifications such as the redistribution of wealth.

(1) Microeconomic theories of regulation

In order to understand the traditional economic justifications for regulation, which are based on theories of market failure, it is necessary at this juncture to consider briefly the fundamentals of microeconomic theory, which explains how a paradigm market operates. A private market consists of two categories of players: firms and consumers. Firms exist primarily in order to make a profit for their owners and investors, and a rational firm will attempt to maximise its profits 'subject to the constraints … imposed … by consumer demand and the technology of production'.[7] This is achieved by reaching the stage where goods or services are being produced at a level such that (i) producing one more unit of the good or service would cost the firm more than the profit its sale will generate and (ii) the saving that would be made by producing one fewer unit of the good is outweighed by the reduction in the amount of profit that

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[5] See below at 148 - 149.
[6] See below Ch 5 at 171.

would accrue. Consumers exist, in the eyes of micro economists at least, primarily to purchase those goods and services that are of the greatest benefit to themselves, subject to the depth of their pockets. The consumer attempts rationally to evaluate all those goods and services that have the potential to be of utility to her and then purchases that combination of goods whereby (i) the benefits of purchasing goods more suited to her – e.g. those of a higher quality, or the same goods in a higher quantity – will be outweighed by the extra cost involved and (ii) the benefit of saving money by purchasing fewer goods or goods of a lower quality will be outweighed by the lower amount of utility that follows.

In a perfectly competitive market,[8] firms and consumers are able to maximise their respective profit and utility. In other words, the quality and quantity of goods that firms will produce in order to maximise their profits will be the same as the quality and quantity of goods that consumers will purchase to maximise their utility. This is because of the theory of supply and demand: if the firms operating in a particular market produce more of a particular product than consumers desire, then the market price will drop and firms will produce less of the product. As the price drops, more consumers will decide that the benefit of purchasing the product outweighs the cost and so demand will increase. The reverse is also true – if consumers desire more of a particular product than firms provide, the market price will increase and firms will respond by producing more of the product. As the price increases, fewer consumers will be prepared to bear the extra cost and so demand will tail off. After some initial fluctuation, the market will eventually level off and the levels of supply and demand will be the same.[9] This is possible because in a perfectly competitive market, the number of firms and consumers is such that no individual actor can influence the market price. This state of affairs is desirable in that it is said to be 'productively' efficient, in that it is not possible for firms either to increase output but maintain costs or maintain output but reduce costs.[10] It is also 'allocatively' efficient, in that every

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[7] Cooter, R., and Ulen, T., *Law and Economics* (Reading, Adison Wesley Longman, 2000) at 26.

[8] See Cooter and Ulen, above n 7 at 29 – 30; Gellhorn, E., and Pierce, R., *Regulated Industries* (St Paul, Minnesota, West Publishing, 1987) at 28 – 33; Ogus, A., *Regulation: Legal form and economic theory* (Oxford, Clarendon Press, 1994) at 22 – 23.

[9] Referred to as 'market equilibrium': see Cooter and Ulen, above n 7 at 29.

[10] Cooter and Ulen, above n 7 at 12.

party is better off as a result of the transactions that take place within the market, because the firms all value their revenue more than their products whilst consumers value the products more than the money spent on them[11] (were it otherwise, firms would choose to keep their products and consumers would choose to keep their wallets closed).

(2) Traditional 'market' failure justifications for regulation

The traditional economic justifications for regulation arise when the circumstances are such that a particular market is not perfectly competitive and so does not tend towards market equilibrium. These circumstances are (i) where one firm has a monopoly (or where a small number of firms operate a price-fixing cartel to the same effect); (ii) where excessively competitive practices – for example, temporarily selling products at low prices in order to drive rival firms out of business – threaten to undermine the market; (iii) where the product in question is a public good; (iv) where externalities result from the production of a particular good or service; (v) where information deficits prevent consumers from making rational choices; and (vi) where the nature of the market is such that production is naturally irregular, either temporally or geographically.

Monopoly power and anti-competitive behaviour

Market equilibrium will only occur where there is a sufficiently large number of firms and consumers to prevent any one player in the market from influencing the market price of a product. If there is a monopoly – i.e. only one firm operates in a particular market – then lack of competition means that market equilibrium is unlikely to be achieved naturally. When a monopoly arises, the one firm in the market, in order to maximise profit, will

> curtail … production in order to raise prices (from fewer sales) by gaining revenue through increased price on the units that are still sold.[12]

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[11] *Ibid.*

[12] Breyer, above n 3 at 15 – 16. See also Baldwin and Cave, above n 2 at 10.

In addition to the likelihood of increased prices, there is a risk that a monopolistic firm will be 'lazy' with regard to the costs of production,[13] as the lack of competition removes the incentive to keep such costs to a minimum. Further, a firm may fail to meet what society deems to be an appropriate level of customer service – if consumers are treated shabbily by company *x* in a monopoly market, there is 'no ready recourse' to an alternative service provider.[14] There may also be a non-economic element to the regulation of monopolies, in that society tends to harbour a 'distrust of the social and political … power of an unregulated monopolist' irrespective of any market failure.[15]

A monopoly will typically arise if three conditions occur:[16] (i) where the market is constituted by a single firm;[17] (ii) where the good or service supplied is unique;[18] and (iii) where 'substantial barriers' prevent potential rival firms from entering the market.[19] Similar problems will also arise in those markets where, although more than one firm is present, there is 'collusion' between firms who form cartels and engage in anti-competitive activities such as price-fixing.[20] Because the market is unable to correct these problems naturally, the existence or threat of a monopoly is viewed traditionally as justifying some form of state intervention.[21] Typically, this will take the form of competition law.[22]

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[13] Breyer, above n 3 at 16. The problem of organisational slack has also been noted in the civil society context: see Ortmann, A., 'Modern Economic Theory and the Study of Nonprofit Organizations: Why the Twain Shall Meet' (1996) 25 *Nonprofit and Voluntary Sector Quarterly* 470 at 472. This may be particular problem for CSOs: Rose-Ackerman notes that the lack of 'market discipline' (not specific to monopoly power but inherent in non profit distribution) may mean that an organisation continues to operate long after it has served its purpose or ceased to be effectual (Rose-Ackerman, S., 'Altruism, ideological entrepreneurs and the non-profit firm' (1997) 8 *Voluntas* 120 at 125).

[14] Breyer, above n 3 at 20.

[15] Breyer, S., 'Regulation and Deregulation in the United States' in Majone, above n 1 at 10.

[16] Gellhorn and Pierce identify a fourth condition, that of information asymmetry (above n 8 at 33). This is unsatisfactory, for although information asymmetry may tend towards market failure, and as such may justify regulation, it will not result in a monopoly market unless one firm is somehow immune to information deficits affecting its market rivals such that they are driven out of business; it is not at all clear whether such a state of affairs could arise. Accordingly, information asymmetry is treated as a distinct category of market failure (see below at 132 - 137).

[17] See Baldwin and Cave, above n 2 at 10; Gellhorn and Pierce, above n 8 at 33.

[18] *Ibid.*

[19] *Ibid.*

[20] See Cooter and Ulen, above n 7 at 40; Ogus, above n 8 at 30.

[21] See generally Breyer, above n 15 at 10; Cooter and Ulen, above n 7 at 40; Gellhorn and Pierce, above n 8 at 33 – 35, 44 - 49; Ogus, above n 8 at 30; Kay, J., and Vickers, J.,

The nature of certain industries is that they will naturally tend towards monopoly rather than perfect competition.[23] This is likely to be the case where, no matter how many units of a particular good are produced, the firm never reaches the stage described above where producing one more unit of the good or service would cost the firm more than the profit its sale will generate.[24] In other words, it will never be in the interests of profit-maximisation for the firm to stop producing more units. Moreover, as the overall production cost of each unit drops as more units are produced, the price will lower accordingly. Where this is the case, it is in the interests of both consumers and the firm itself to have a monopoly rather than a competitive market. The paradigm example of a natural monopoly is the supply of electricity[25] - the initial outlay is high, in that generators and supply networks must be established before even one unit can be supplied. However, once the generators and networks are in place and that first unit has been supplied, it will always be more cost-effective to produce more units.[26] However, whilst a natural monopoly will in theory result in both lower production costs and lower prices, in practice the lack of rival firms is likely to mean that the monopoly firm will succumb to the same temptations that afflict firms in other monopolies – namely, the temptation to (i) increase prices, (ii) neglect ways of reducing production costs and (iii) neglect customer service. Consequently, state intervention is also desirable in the case of natural monopolies. However, competition laws will clearly be inappropriate here, as competition will be more costly than the

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'Regulatory Reform: An Appraisal' in Majone, above n 15 at 227 – 228; Sunstein, C., *After the Rights Revolution: Reconstituting the Regulatory State* (Cambridge, Massachusetts, Harvard University Press, 1990) at 48 – 49.

[22] Also referred to as antitrust law: e.g. Cooter and Ulen, above n 7 at 40; Ogus, above n 8 at 30. Ogus implies that where competition law is the state response to monopoly or collusion between firms, this should not be viewed as regulation because such law 'serves to reinforce rather than overreach the market system' (Ogus, above n 8 at 30) whether one subscribes to this approach depends on whether we take a narrow or broad view of what we mean by regulation (see above Ch 1 at 17).

[23] Referred to in the literature as 'natural' monopolies: see e.g. Cooter and Ulen, above n 7 at 40; Kay and Vickers, above n 21 at 227; Ogus, above n 8 at 30.

[24] See above at 116 - 117.

[25] See Ogus, above n 8 at 31.

[26] It should be noted that a natural monopoly may occur only at one particular stage in the production process – Ogus notes that in the case of electricity supply, whilst it is clearly cost-effective to have a single network for transmission, it may be appropriate for more than one firm to generate the electricity (above n 8 at 31; see also Baldwin and Cave, above n 2 at 10 – 11).

monopoly. Instead, regulating the monopoly firm with regard to its 'prices, quality and output' is the traditional response.[27]

Criticisms of monopoly power as a regulatory justification

Sunstein suggests that regulation as a response to monopoly markets is the 'least controversial' form of regulation.[28] However, Breyer notes a number of factors that 'seriously temper the enthusiasm' for reacting to monopolies with state intervention.[29] First, although monopoly markets lead to higher prices, if there were the same level of monopoly across the economy it would mean that the relative prices of goods would remain the same as if the whole economy was perfectly competitive and so consumers would still be able to make rational choices.[30] However, it will be difficult to measure degrees of monopoly and so whilst this may be true, it will be difficult to know when this is the case. Second, a monopoly firm can maximise its profit *without* reducing its output if it can engage in 'price discrimination' between consumers, and charge certain customers more than others for the same product.[31] However, this is often administratively unworkable and in many cases would be futile, as consumers who purchase goods at lower prices can simply resell to consumers who would otherwise be forced to pay higher prices.[32] Third, the fact that most monopolies do not operate in perfect isolation may mean that firms resist the temptation to raise prices and lower output. For example, where there are rival products in another market, the threat of alienating consumers may keep a monopoly firmly in check.[33] Thus, if there was a monopoly on air travel, the fact that consumers could turn to rail, road or sea if they were dissatisfied with the firm's product might well reduce the problems detailed above. Also, where the entry barriers to the market are not prohibitively high, the threat that other firms may enter the market in the future may have a similar effect.[34]

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[27] Baldwin and Cave, above n 2 at 10. Where the natural monopoly only affects the transmission stage of production, then it may also be necessary to regulate access to the means of transmission (Baldwin and Cave, *ibid*).
[28] Sunstein, above n 21 at 48.
[29] Breyer, above n 3 at 16.
[30] *Ibid* at 16 – 17.
[31] *Ibid* at 17 – 18.
[32] *Ibid* at 17.
[33] *Ibid* at 18.
[34] *Ibid* at 18.

We should also note that regulation is not the only state response to market failure in this situation – it may be more appropriate to nationalise the industry in question.[35]

Relevance to civil society

There are several things that we can say about treating the regulation of organised civil society as a response to monopoly. First, it is clear that there are two specific areas of activity in which CSOs regularly operate on a monopolistic basis. First, a number of organisations that regulate entry into particular professions are constituted in such a way that they might properly be classed as falling within the sector.[36] For example, in England, the General Medical Council and the General Council of the Bar both have the shared characteristics of CSOs identified in Chapter Two, and pursue an appropriate social function (the provision of market support).[37] Both exercise a gatekeeping function such that anyone wishing to practise as a doctor or barrister must meet the training requirements and standards of conduct demanded of the respective professional body – accordingly, they have a monopoly on entry to their professions. Similarly, trade unions that operate on a 'closed shop' basis effectively have a monopoly on entry into a particular trade. Second, some ideological organisations may operate on a monopoly basis if there are no other organisations with comparable belief systems – in other words, if the services provided are unique. For example, if a member of church *x* is told that if he breaches the church rules he will be excommunicated, then it will be of little consolation to him that he would be welcomed into churches *y* and *z* if those churches are not compatible with his religious beliefs.[38] However, aside from professional and ideological organisations, it is not clear that there are any other areas of civil society activity that are particularly likely to

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[35] *Ibid* at 18 - 19. Of course, this brings with it its own problems, such as 'risk of undue political interference' (at 19).

[36] See below Ch 5 at 184.

[37] Indeed the GMC was awarded charitable status in April 2001: see below Ch 5 at n 70; note also the Nursing and Midwifery Council, which was awarded charitable status on 27 March 2002.

[38] Of course, whereas the aspirant doctor prevented from practicing by the GMC is forced to give up his chosen profession, here the member of church *x* could in theory band with others to establish a rival organisation upon excommunication – we have already noted that one of the advantages of CSOs is the relative ease with which they can be formed (see above Ch 3 at 73 - 75). However, in reality this is unlikely to satisfy the member as we may assume that he

tend towards monopoly. Not only is there multiple CSO presence in the areas of activity discussed in the previous chapter, but, as we consider in detail in the following chapter,[39] the fact that no social function is the exclusive province of civil society means that there will typically be a public or private sector presence as well. It is, of course, perfectly possible that within a specific field a CSO may develop a unique product, which may warrant a specific regulatory response.[40] However, it would clearly be inappropriate to justify any broader, sector-based regulation by reference to the control of monopoly.

More generally, however, we might note that we have already considered the fact that CSOs are regularly engaged in creating *new* markets: identifying and responding to areas of social need which have yet to be formally acknowledged.[41] Where this is the case, there may be so-called 'first-mover' advantages for the organisation which responds the fastest – namely, the potential to capitalise on the period during which it is the only service provider in order to establish a dominant position in the market.[42] The first-mover advantage may be increased where a CSO is already a dominant player in another market, as it will be able to 'impose high barriers against new entrants … [by taking] advantage of economies of scale, access to a large contributor base, and relatively ready access to distribution channels'.[43] Where this is the case, regulation may again be justified, although as the first-mover phenomenon is not specific to

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wishes to be a *follower* rather than a *leader*; further, his belief system may itself stipulate membership of church *x*.

[39] See below Ch 5 at 158.

[40] It should be noted that the fact that CSOs typically operate on a nonprofit basis may limit some of the problems usually associated with monopolies: where an organisation does not operate so as to maximise profit it does not follow that in monopoly conditions it will reduce output and raise prices in the manner described above. However, other problems – particularly the issue of excessive social and political power, or the risk of organisational slack (on which, see generally Steinberg, R., 'Nonprofit Organizations and the Market' in Powell, W. (ed.), *The Nonprofit Sector A Research Handbook* (New Haven and London, Yale University Press, 1987), esp at 127 – 130) – may still justify some form of regulation.

[41] See above Ch 3 at 106 - 107.

[42] See e.g. Conrad, C., 'The Advantage of Being First and Competition Between Firms' (1983) *International Journal of Industrial Organization* 353; Mueller, D., 'First-Mover Advantages and Path Dependence' (1997) 15 *International Journal of Industrial Organization* 827.

[43] Tuckman, H., 'Competition, Commercialization, and the Evolution of Nonprofit Organizational Structures' in Weisbrod, B. (ed.), *To Profit or Not to Profit: the Commercial Transformation of the Nonprofit Sector* (Cambridge, CUP, 1998) at 31.

CSOs, this is something which, again, is perhaps better tackled by activity specific, rather than sector specific, regulation.

Whilst it is unlikely that sector-based regulation can be justified by reference to monopoly control, regulation may be appropriate if CSOs engage in anti-competitive practices. Although some argue that competition is anathema to the concept of civil society,[44] and, in theory, all the players in the sector have 'the same ultimate goal' and so should not need to compete with each other,[45] the fact that there is only a 'finite pot of donations'[46] from which civil society activity is resourced means that not every CSO will be able to carry out all its existing and proposed future activities to completion.[47] Consequently, it is inevitable that some CSOs will find themselves competing with others for funding.[48] This is likely to be exacerbated (i) by the contract culture,[49] where organisations are forced to tender for government funding and demonstrate that they provide the most attractive package for service provision,

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[44] E.g. Gardner argues that the moral virtue of charity is incompatible with competition: if *x* and *y* are both in need then *z*, being someone motivated by charity alone, will simply give money to whoever approaches her first without making any judgment as to the relative worth of *x* and *y*. If *z* were to make such a judgment, and then give to whomever was more deserving, she would be motivated by justice. See Gardner, J., 'The Virtue of Charity and its Foils' in Mitchell, C., and Moody, S., (eds.), *Foundations of Charity* (Oxford, Hart, 2000). Of course, neither the charitable sector or wider organised civil society are synonymous with moral charity – see above Ch 3 at 98 - 100.

[45] Greyham Dawes, R., *Tolley's Charity Accountability and Compliance 1998 – 99* (Surrey, Tolley, 1998) at 1.3.

[46] Morris, D., 'The Media and the Message: An Evaluation of Advertising by Charities and an Examination of the Regulatory Frameworks (1995 / 96) 3 CLPR 157 at 158.

[47] Although there is no empirical research relating to the difference between the income received by the sector and the income needed to maximise its activity, the fact that those CSOs devoted to relieving specific social needs – e.g. homelessness, poverty – are still in business suggests that some shortfall exists.

[48] It would seem likely that only those CSOs with a stable source of sufficient income from an endowment fund will ever be wholly exempt from such competition. Again, there is no empirical research relating to the extent of competition in organised civil society (indeed, this is probably not quantifiable). However, an opinion poll carried out by the Charity Commission in 1999 suggested that public opinion was that there are 'too many charities competing for too few funds' (Charity Commission, *RS4: Collaborative Working and Mergers* (London, Charity Commission, 2003) at n 1 and associated text; note also Halfpenny, P., and Lowe, P., *Individual Giving and Volunteering in Britain: Who Gives what – and Why?* (Tonbridge, Charities Aid Foundation, 1994), para 5.4. Although public opinion is clearly not an accurate measure of competition, this may be a self-fulfilling prophesy in that if potential donors believe that CSOs are competing for their patronage, they are likely to make donations as though this were the case – i.e. by making a rational choice between CSOs – thus forcing CSOs into competition.

[49] See above Ch 2 at n 73.

and (ii) where CSOs operate in the same sphere as private sector firms.[50] Those CSOs feeling the pressure of competition have an incentive to engage in anti-competitive practices such as forming cartels with funding bodies in order to divert resources away from rival organisations.[51]

Excessive competition

At this juncture it is appropriate to briefly mention the issue of excessive competition, in which CSOs may be tempted to engage so as to maximise their own funding opportunities.[52] In the context of the private market, excessive competition refers to the situation where an organisation competes with rivals so aggressively as to 'force' them out of business.[53] By temporarily setting prices so low that other firms are unable to attract consumers to their products, it can obtain greater market 'domination' and thus the ability to set prices at a higher level than would otherwise have been viable.[54] From the point of view of organised civil society, this kind of predatory pricing could in theory be practised by those CSOs that provide a service in return for a fee – for example, educational establishments. However, we have noted that one of the key rationales for selecting CSOs over the private market is their perceived greater degree of trustworthiness in delivering services where it is either impossible or impractical to assess quality, even after delivery.[55] Hence, it may be that if a CSO lowered prices significantly below those of its rivals, clients would suspect that this was at the expense of service quality. If this were indeed the case, then clients would respond by gravitating towards the rival organisations, and the CSO's incentive to lower prices would diminish. Accordingly, the sector would remedy the problem itself and regulation would not be required. Excessive competition may also be practised by CSOs that do not engage in service provision – e.g. through aggressive fundraising

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[50] See below Ch 5 at 168.
[51] See Downer, S., 'Third sector 'cartel' blasted for controlling NDC funds', *New Start*, 10 December 2003, who reports that a leaked draft paper by Northumbria University's Sustainable Cities Research Institute discloses evidence of an attempt by three CSOs in Sunderland to 'control developments in the area in order to ensure that they dominate delivery'. At the time of writing, this paper is yet to be published.
[52] On CSO competition generally, see Tuckman, above n 43 at 25 – 37.
[53] Breyer, above n 3 at 29. See also Baldwin and Cave, above n 2 at 13; Breyer, above n 15 at 11; Gellhorn and Pierce, above n 8 at 49 - 50; Kay and Vickers, above n 21 at 227 – 228.
[54] Baldwin and Cave, above n 2 at 13.

campaigns.[56] In any case, Breyer argues that excessive competition will never be likely to justify regulation of the private market, because organisations would not only have to outlast their rivals but also somehow prevent them from re-entering the market.[57] There is no reason to think that the same would not also be true in the context of organised civil society – indeed, the comparative ease with which CSOs can disband and reform should make this even less of a problem.[58]

Public goods

We have already noted that the market is unable to provide a significant level of public goods by virtue of the free rider problem and the perceived lack of trustworthiness of for-profit firms.[59] In addition to proving the impetus for civil society activity in this area,[60] this is also one of the traditional economic justifications for regulating the private market.[61] Ogus notes that the market is able to operate as service provider so long as there is state intervention in relation to two key functions: (i) raising monies to 'secure the supply' and (ii) determining the 'quality and quantity' of the goods in question.[62] The fact that civil society presence in this sphere is itself, at least according to Weisbrod,[63] a response to market failure suggests *prima facie* that it would be inapt to justify regulation of organised civil society by reference to the need to provide public goods. Certainly we have already considered the fact that CSOs are, in theory, in a better position than the state to determine the quality and quantity of public goods provision.[64] However, it will be apparent from the discussion of competition within the sector above that problems may arise in relation to the ability to raise sufficient funds.[65] This is discussed in detail below.[66]

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[55] See above Ch 3 at 65 – 67, 88 - 89.
[56] We shall discuss the control of campaigning as a justification for regulation below (at 129 - 131).
[57] Breyer, above n 3 at 32. Unless it is clear that an organisation can achieve this, it would be 'irrational' to attempt this action (Breyer, *ibid*).
[58] See above at 112.
[59] See above Ch 3 at 65 - 66.
[60] See above Ch 3 at 66 - 67.
[61] See generally Baldwin and Cave, above n 2 at 13 – 14; Breyer, above n 3 at 22; Gellhorn and Pierce, above n 8 at 55 – 58; Ogus, above n 8 at 33; Sunstein, above n 21 at 49 – 52.
[62] Ogus, above n 8 at 33.
[63] See above Ch 3 at 63 - 65.
[64] See above Ch 3 at 76 - 78.
[65] See above at 124 - 125.

Externalities

The fourth traditional economic justification for regulation is as a response to externalities, or 'spillovers'[67] – the 'social costs' of a product that are not taken into account in pricing by firms or consumers.[68] For example, let us imagine that the manufacture of product *x* results in pollution affecting all the inhabitants of town *y*. If all of the inhabitants are able to co-ordinate themselves and bring an action in private law (for example, in the torts of negligence or nuisance) then the cost of the pollution will be borne by the producer; this will then be reflected in the price of product *x*. However, if the inhabitants are large in number, then concerted action by the affected individuals may well be hard to co-ordinate and may be affected by the free rider phenomenon. Further, the nature of the pollution may be such that detrimental effects are not manifested until many years later, or such that the manufacture of product *x* is only one of several contributory factors. In these situations it becomes unlikely that the producer will bear the cost – either because no action is brought (because the inhabitants do not co-ordinate their efforts or are unaware of the pollution) or because it is impossible to accurately assess the proportion of damage attributable to the production of *x*.

As far as CSOs are concerned, there is nothing inherent in (i) the provision of market support; (ii) the provision of public goods; (iii) the delivery of complex services; (iv) the redistribution of wealth; (v) the provision of cultural services; or (vi) the facilitation of entrepreneurship – that would suggest externalities are likely to result from civil society activity in these areas. Of course, individual activities carried out in pursuit of these functions may result in externalities: for example, a university's chemistry department may, in the pursuit of research, carry on experiments that contribute towards pollution in one of the ways described above. Where such externalities occur it may be that activity-based regulation is desirable. However, it would be inappropriate to justify sector-wider regulation on this basis. Further, activity-based regulation would tend towards a coherent approach to the externality –

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[66] See below at 138 - 140.
[67] Breyer, above n 3 at 23; Breyer, above n 15 at 10.
[68] Ogus, above n 8 at 35. See generally Baldwin and Cave, above n 2 at 11 – 12; Gellhorn and Pierce, above n 8 at 55 – 58; Kay and Vickers, above n 21 at 226 – 227; Sunstein, above n 21 at 36, 54 – 55.

in the example above, organisations outside civil society may pollute the environment as well, so we would not wish to restrict appropriate regulatory provisions to CSOs.

It should perhaps be noted at this juncture that the fact that much civil society activity is carried out by volunteers, as opposed to employees, will not, in itself, increase the likelihood of a CSO producing externalities. One might assume that the lack of formal nexus between volunteer and organisation may make it difficult to fix a CSO with vicarious liability for the actions of its volunteers. If this were the case, then a CSO would not be held to account for any tortious or criminal act carried out by a volunteer in the course of acting for the CSO, thereby rendering the effects of the act externalities. However, it is clear that volunteers may be viewed as agents and CSOs their principals. In the words of the leading text on agency:[69]

> There is no general requirement in the law of agency that an agent has a contract with his principal, and the external position between principal and third party can certainly be changed by a gratuitous agent.

Accordingly, CSOs can be liable for the actions of their volunteers just as private firms can be liable for the actions of employees carried out in the course of their employment.[70]

Protection of vulnerable parties

It is convenient at this point to briefly mention the fact that certain civil society activities have the potential to cause harm to individuals who interact with the sector's

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[69] Reynolds, F., *Bowstead and Reynolds on Agency* (London, Sweet and Maxwell, 2001) at 162. See also Moody, S., 'Policing the Voluntary Sector: Legal Issues and Volunteer Vetting' in Dunn, A., (ed.), The Voluntary Sector, the State and the Law (Oxford, Hart, 2000) at 53 – 54, who notes an earlier edition of *Bowstead* ((London, Sweet and Maxwell, 1995) at 2) on the same point); also *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552.

[70] Indeed, the modern rationale for imposing vicarious liability in tort relates simply to the issue of whether there is 'a significant connection between the creation or enhancement of a risk and the ensuing wrong' (Wingfield, D., 'The Short Life and Long After Life of Charitable Immunity in the Common Law' (2003) Can Bar Rev 315 at 343; see also *Bazley* v *Curry* (1999) 174 DLR (4th) 45; *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215). If an organisation carries out activities and, in the course of doing so, enhances the risk that third parties will be harmed by volunteers working under the organisation's control, then that organisation may well be made vicariously liable for their actions in just the same way as a private sector organisation may be made liable for the actions of its employees. (See also the Promotion of Volunteering Bill 2004, which proposes the use of 'Statements of Inherent Risk' that will spell out the risks

participants. In particular, a number of CSOs are routinely engaged with individuals who have an inherent level of vulnerability above that of the average citizen,[71] such that there may be said to be a relationship of trust and confidence between CSO workers and those who benefit from their services. Where CSO worker *x* has such a relationship with vulnerable beneficiary *y*, there is clear potential for *x*, as the dominant actor, to cause harm to *y*, whether intentionally or otherwise. Such harm can be classed as an externality if the CSO is not held responsible – for example, if a class of schoolchildren are routinely abused by their teacher, this may go unchecked if the pupils feel too afraid to complain or are too young to realise that they are being abused; even in adulthood, pupils may never come forward for fear of stigmatisation. Accordingly, it may be appropriate to regulate certain activities for the reasons given in the previous paragraph. However, it may also be appropriate to regulate even where the harm is not technically an externality: a society may view certain forms of harm as being so abhorrent that it will never be enough to ensure simply that their social cost is borne by the relevant CSO.[72] Rather, it is preferable to ensure they never occur in the first place. The inherent vulnerability of the groups listed above may mean that harm caused to their members is viewed in this way and, if so, regulation to prevent the harm from occurring may be justified. However, the fact that the need to protect vulnerable parties is activity-specific, rather than sector-specific, means that, as with pure externalities, activity-based regulation is probably more appropriate than sector-wider regulation. Again, this would also have the advantage of ensuring a coherent approach to the harm in question.

Control of campaigning

If a CSO undertakes campaigning this may lead to the production of externalities. Campaigning of a political nature is particularly likely to be carried out by those CSOs which have (i) the facilitation of political action and (ii) the facilitation of self-

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involved in CSO activities and will be taken into account in any subsequent actions for negligence or breach of duty (s 2).)

[71] E.g. children, the physically or mental ill, the poor, minority groups and the otherwise disadvantaged. The CSOs that are particularly likely to deal with these groups are those engaged in certain forms of wealth redistribution (particularly the advancement of education, the advancement of health and the relief of poverty) and the facilitation of political action.

determination as their primary purpose.[73] However, organisations operating across all the social functions discussed in the previous chapter may also engage in campaigning – for example, in order to effect a change in the law or government policy relating to their sphere of activity or simply to raise funds or public awareness.[74] Campaigning may result in externalities in that excessive lobbying can be a 'divisive and fragmenting influence'[75] which may overload any given decision making process and lead to 'political paralysis'.[76] Accordingly, Barendt notes that in respect of freedom of expression in general:[77]

> some regulation ... must surely be conceded, if any expression is to be communicated effectively.

Even if campaigning is undertaken on a more general basis, as opposed to being specifically targeted at official decision-makers, there is a risk that inaccurate or polemical campaigns will manipulate public opinion without due cause.[78] This

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[72] It may also be appropriate to make use of criminal sanctions as a deterrent against these types of harm.

[73] Indeed, single issue campaigning is singled out for criticism by the Deakin Commission as a 'disruptive element' within the sector (Dunn, A., 'Shoots among the Grassroots: Political Activity and the Independence of the Voluntary Sector' in Dunn, above n 69 at 156). Knapp, M., Robertson, E., and Thomason, C., 'Public Money, Voluntary Action: Whose Welfare?' in Anheier, H., and Seibel, W. (eds.), *The Third Sector: Comparative Studies of Nonprofit Organisations* (Berlin and New York, Walter de Gruyter, 1990) note the potential for 'sectarianism' in the sector (at 214); see also Blair, H., 'Donors, Democratisation and Civil Society: Relating Theory to Practice' in Hulme, D., and Edwards, M., *NGOs, States and Donors: Too Close for Comfort* (Basingstoke and London, MacMillan, 1997) on the potential for 'destructive ethnic conflict' at 40.

[74] A campaign designed purely to raise funds from the public can, of course, easily cross the line and become political even if it is not specifically designed to change the law (see Morris, above n 46 at 174).

[75] Boris, E., 'Nonprofit Organisations in a Democracy: Varied Roles and Responsibilities' in Boris, E., and Steuerle, E. (eds.), *Nonprofits and Government Collaboration and Conflict* (Washington, DC, Urban Institute Press, 1999) at 23. See also James, E., 'Economic Theories of the Nonprofit Sector: A Comparative Perspective' in Anheier and Seibel, above n 73 at 24.

[76] Jenkins, J., 'Nonprofit Organizations and Policy Advocacy' in Powell, above n 40 at 296. See also 6, P., and Randon, A., *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Aldershot, Dartmouth, 1995) at 139; Blair, above n 73 at 30;

[77] Barendt, E., *Freedom of Speech* (Oxford, Clarendon Press, 1985) at 13.

[78] Boris, above n 75 at 23. Morris notes that this may be a particular problem in respect of those CSOs with charitable status, as their perceived elevated status may enhance their standing in the eyes of the public (Morris, above n 46 at 172). InterAction guidelines stress the importance of ensuring that campaigns draw a balance 'neither minimise nor overstate the human and material needs of those whom it assists' (InterAction American Council for

problem may be exacerbated by the fact that, whereas campaigning by the state is called to account by opposition parties and CSOs, and private sector campaigning is called to account by rival firms, civil society campaigning has no natural control,[79] except insofar as rival CSOs may be competing for the same funding and thus have an incentive to disprove each other's inaccurate campaigning.[80]

In addition to producing externalities, some regulation of campaigning may also be justified on the ground that participation in the political arena risks compromising the independence of the sector, in that individual CSOs may be tempted to form allegiances with political parties or officials in an attempt to secure the passing of a particular law or the implementation of a particular policy. Such arrangements may encourage those CSOs to take the interests of their political allies into account when making decisions and lose their 'non-partisan' reputation.[81] Loss of the structural characteristic of independence would be a significant one: it would undermine the ability of the sector to contribute towards the accountability of political players,[82] especially were an individual CSO to be called upon to pass comment on the actions of its ally; it may result in the application of a CSO's resources to activities approved by its ally rather than its members or benefactors;[83] and, on a more general level, it may reduce trust and confidence in the sector which is likely, in turn, to exacerbate concerns relating to information deficits.[84] Further, we have already noted that one of the reasons why organised civil society is an appropriate provider of public goods is the fact that the sector is relatively insulated from 'populist pressures'.[85] Political campaigning is likely to raise the profile of a CSO and remove a layer of political insulation.

Voluntary International Action, *PVO Standards* (www.interaction.org, InterAction, 2002 web version), para 5.3).

[79] See Bennett, J., and DiLorenzo, T., *Unhealthy Charities Hazardous to your Health and Wealth* (New York, BasicBooks, 1994) at 31.

[80] See above at 124 - 125.

[81] InterAction, above n 78, para 8.3.

[82] See above Ch 3 at 94 - 95.

[83] See generally Meier, R., 'The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds' (1999) 147 *University of Pennsylvania Law Review* 971.

[84] On which see below at 132 - 137.

[85] Blair, above n 73 at 40. See above Ch 3 at 79 - 79.

Information deficits and accountability

Regulation is also traditionally justified where a particular market does not tend towards the free flow of information that consumers need in order to make rational purchasing decisions.[86] We have already noted that where it is impossible or highly impractical to evaluate a particular good or service prior to its purchase, and sometimes even after its purchase, consumers will be ill-equipped to decide which products or combination of products will be of the greatest utility.[87] In this situation, although a producer could rectify matters by making relevant information about its products freely available, there will be a temptation to mislead consumers into selecting its products over those of its rivals by supplying 'false information or by omitting key facts'.[88] Accordingly, state intervention may be justified to compel firms to provide sufficient (and accurate) information so as to ensure that consumers are able to make rational choices.

Relevance to civil society

It may seem, *prima facie*, that regulating organised civil society on the ground of information asymmetry would be somewhat misguided. We have already noted that the theory of contract failure uses the information deficits inherent in (i) public goods,[89] (ii) complex private services[90] and (iii) the redistribution of wealth,[91] to explain civil society's presence in these areas – the idea being that, because they generally do not operate on a for-profit basis, CSOs lack the fiscal temptation to deceive consumers in the way that a private firm might choose to do. If organised civil

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[86] See generally Breyer, above n 3 at 26 – 28; Kay and Vickers, above n 21 at 228 – 230; Ogus, above n above n 8 at 38 – 41; Sunstein, above n 21 at 52 – 53.
[87] On information asymmetry, see above Ch 3 at 65 - 66.
[88] Breyer, above n 3 at 27. It should be noted that the problem of lack of information not one that only blights consumers – firms may also suffer at the hands of information asymmetry. Kay and Vickers note that in the insurance industry it is the consumers who hold the upper hand and have an incentive to conceal personal information that would otherwise cause their premiums to increase (above n 21 at 230).
[89] See above Ch 3 at 65 - 68.
[90] See above Ch 3 at 88 - 89.
[91] See above Ch 3 at 89 - 90.

society is itself a response to information asymmetry,[92] one might assume that there would be no need to regulate CSOs for this reason. However, there are several reasons why the sector might suffer from problems relating to information deficits.

First, organised civil society will only be a viable alternative to the market where consumers are confident that CSOs do, in fact, operate on a nonprofit basis. Without some form of regulation, organisations may decide to operate on a for-profit basis, in order to make money for the benefit of private concerns, but conceal this from donors and other stakeholders. Although one would hope that the civil society 'ethos' discussed earlier would counter the incentive to operate a CSO for private benefit,[93] we have already noted that the sector's reputation of trustworthiness may attract dishonest persons keen to exploit its resources.[94] Accordingly, regulation to ensure the accountability of CSO directors and trustees has been described as the 'charm ... expected to both prevent and cure the evils of sleaze and corruption'.[95]

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[92] Albeit a very different one to regulation. The latter is an attempt to artificially shape the operation of the market whereas the former is an organic attempt to provide an alternative to the market.

[93] See above Ch 3 at 111.

[94] See above Ch 3 at 69 - 70; also Kendall, J., and Knapp, M., *The Voluntary Sector in the UK* (Manchester, Manchester University Press, 1996) at 257 – 258; Ortmann, A., and Schlesinger, M., 'Trust, repute and the role of non-profit enterprise' (1997) 8 *Voluntas* 97 at 103; Young, D., 'Alternative Models of Government-Nonprofit Sector Relations: Theoretical and International Perspectives' (2000) 29 *Nonprofit and Voluntary Sector Quarterly* 149 at 156.

[95] Belcher, A., 'Board Responsibilities in the Voluntary Sector: The Case of Housing' in Dunn, above n 69 at 62. Just as Breyer notes that there can be 'little quarrel' with regulation that remedies information deficits in the private sector context (above n 3 at 28), there is general agreement among both civil society theorists and official publications that regulation of the sector is justifiable on these grounds: see e.g. Home Office, *Home Office Annual Report 1998 – 99* (London, HMSO, 1998), para 24.1; InterAction, above n 78, para 5 generally (esp. 5.1); Leat, D., 'Are Voluntary Organisations Accountable?' in Billis, D, and Harris, M. (eds.), *Voluntary Agencies Challenges of Organisation and Management* (Basingstoke and London, MacMillan, 1996) at 66 Parliamentary Select Committee on Public Accounts, *Charity Commission: Regulation and Support of Charities* (HC 408, 1998), para 6; Rochester, C., 'Voluntary agencies and accountability' in Davis Smith, J., Rochester, C., and Hedley, R. (eds.), *An Introduction to the Voluntary Sector* (London and New York, Routledge, 1995) at 193; Salamon, L., 'Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' in Ostrander, S., and Langton, S., *Shifting the Debate: public/private sector relations in the modern welfare state* (New Brunswick, Transaction, 1987) at 45; Simon, K., *Principles of Regulation for the Not-for-Profit Sector* (www.icnl.org, International Center for Not-for-Profit Law, 1998) at 1; Scottish Charity Law Review Commission, *Charity Scotland The report of Scottish Charity Law Review Commission* (www.scotland.gov.uk/justice/charitylaw/csmr/csmr-00.htm, Scottish Charity Law Review Commission, 2001), recommendation 39; Voluntary Sector Roundtable Panel on Accountability and Governance in the Voluntary

It is also clear that certain CSOs operate legitimately on a for-profit basis. Hybrid organisations such as social enterprises, for example, distribute a limited amount of profit amongst investors.[96] Non profit distributing CSOs may, where appropriate,[97] decide to carry on profit-making activities that are 'ancillary' to their main endeavours,[98] in order to replace or supplement income from donations or state grants[99] and thus fund other, loss-making activities.[100] Without some form of control, these legitimate profit-making CSOs may succumb to the same problems as their illegitimate cousins. Furthermore, Weisbrod notes that the pursuit of profit through ancillary activities may compromise a CSO's main objectives by 'distract[ing] management' or, more seriously, causing 'mission displacement' in order to satisfy potential customers.[101]

Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (www.vsr-trsb.net, Voluntary Sector Roundtable, 1999) at 14.

[96] See below Ch 5 nn 226 – 228 and associated text.

[97] Tuckman suggests that appropriateness turns on four factors: (i) whether a CSO has a need for additional resources; (ii) whether it has a potentially sellable product which (iii) doesn't 'substantially interfere' with the organisation's primary activities; and (iv) whether it will be able to locate 'willing' consumers (Tuckman, above n 43 at 36).

[98] On trading generally see below Ch 5 at 168. Note the distinction drawn by Weisbrod between 'ancillary' trading, which is only undertaken in order to increase revenue for other activities, and trading which is 'mission-related' (Weisbrod, B., 'The Nonprofit Mission and its Financing: Growing Links Between Nonprofits and the Rest of the Economy' in Weisbrod, above n 43 at 18). We are concerned here with the pursuit of profit as an influence on an organisation's behaviour; however, Weisbrod acknowledges the fact that not every CSO commercial activity will be motivated by the pursuit of profit – e.g. trading may reflect 'social-service missions to reach particular target populations' or 'distributional mission[s]' (Weisbrod, *ibid* at 11; see also Weisbrod, B., 'Modeling the Nonprofit Organization as a Multiproduct Firm: A Framework for Choice' in Weisbrod, above n 43 at 52 – 55, 61; and generally Steinberg, R., and Weisbrod, B., 'Pricing and Rationing by Nonprofit Organizations with Distributional Objectives' in Weisbrod, above n 43).

[99] On the relationship between commercial income and other revenue streams, see Weisbrod, *ibid* at 56 – 61; James, E., 'Commercialism among Nonprofits: Objectives, Opportunities, and Constraints' in Weisbrod, above n 43 at 272; also generally Segal, L., and Weisbrod, B., 'Interdependence of Commercial and Donative Revenues' in Weisbrod, above n 43.

[100] See above Ch 3 at 69; also James, E., 'How Nonprofits Grow: A Model' in Rose-Ackerman, S. (ed.), *The Economics of Nonprofit Institutions: Studies in Structure and Policy* (New York, OUP, 1986) at 185 – 195. Indeed, many of the reports of Charity Commission inquiries into the administration of charities made under s 8 of the Charities Act 1993, published on the Commission's website highlight these issues – see e.g. the inquiries into: the Bournemouth Aviation Charitable Foundation (11 January 2005); Frankgiving Ltd (11 January 2005); the Clownes Foundation (2 September 2003); and many others (see generally www.charitycommission.gov.uk/investigations/ inquiryreports/inqreps.asp).

[101] Weisbrod, above n 43 at 54.

Further, we have noted that the pursuit of profit is not the only corrupting influence on organisations – without some form of control, organisations may be tempted to inflate administration costs unnecessarily in order to line the pockets of trustees[102] or employees, for example by paying higher than average wages, remunerating needless expenses or providing overly extravagant facilities;[103] in fact, through:[104]

> everything from power, prestige, and other perks, to cross-subsidisation, influence costs, advocacy expenditures, and organisational slack.

Trustees may also use their position to engage in political campaigning to secure their own interests rather than those of their members.[105] King notes that even the actions of those trustees whose 'motives are pure' may warrant regulation,[106] if, for example, in the case of charitable CSOs, they fail to understand the limits of the expenses for which they can legitimately be reimbursed.[107] By ensuring certain financial information is made available, regulation will also have the additional benefit of revealing to donors, who usually have 'no meaningful opportunity to learn about fund-raising costs',[108] that some administration costs are both legitimate and necessary.

The threats to the quality and quantity of a CSO's activities that stem from information deficits are exacerbated by three factors. First, whenever a CSO is funded by donations, its beneficiaries or consumers will typically be separated from its patrons, which will further hinder the latter's ability to evaluate the quality and quantity of the

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[102] On the issue of trustee remuneration, see above Ch 2 at 49 - 50 and below Ch 5 at 180 - 181.

[103] See above Ch 3 at 69; also Ortmann and Schlesinger, above n 94 at 102 – 105; also Bennett and DiLorenzo, above n 79 at 46 – 47; Bennett and DiLorenzo, above n 79 generally; Hansmann, H., 'The Role of Nonprofit Enterprise' in Rose-Ackerman, above n 99 at 77.

[104] Ortmann, above n 13 at 472.

[105] Blair, above n 73 at 30.

[106] King, M., 'Trustee Benefit' (2000) 6 CLPR 185 at 187.

[107] King, above n 106 at 186 – 187. See *In re Barber* [1887] LR 34 Ch D 77 at 81 *per* Chitty J: 'he is allowed, of course, his costs out of pocket, that is to say, the expenditure, but not anything for his time or trouble. That principle is based upon this consideration, that the Court of Equity will not allow a man to place himself in a position in which his interest and duty are in conflict. If it were not the rule, a trust … might be heavily burdened by reason of business being done by a trustee … employing himself'.

[108] Espinoza, L., 'Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving' (1991) 64 *Southern California Law Review* 605 at 605.

goods or services they have financed.[109] Second, there is a long tradition of testamentary gifts to CSOs.[110] Unlike *inter vivos* gifts, evaluation by a testator is, of course, not merely impractical but impossible. Similarly, those who set up CSOs rather than merely donate to them, whether *inter vivos* or by will, may be discouraged from their endeavours if they believe that, after their death, the organisation's aims may be corrupted.[111] This is particularly significant in the context of charitable CSOs as, by virtue of s 13(1) of the Charities Act 1993 and the doctrine of *cy près*, a charity's funds may be applied to a new purpose, if it is no longer appropriate for its purpose to be carried out.[112] In theory, this purpose must be one that is 'as near as possible' to the original,[113] but it is clear from the caselaw that this is not always the

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[109] See generally Krashinsky, M., 'Transaction Costs and a Theory of the Nonprofit Organization' in Rose-Ackerman, above n 99; Possett, J., and Sandler, T., 'Transfers, Transaction Costs and Charitable Intermediaries' (1988) 8 *International Review of Law and Economics* 145; also Bennett and DiLorenzo, above n 79 at 47 and 50; Steinberg, R., 'Competition in contracted markets' in 6, P., and Kendall, J., (eds.), *The Contract Culture in Public Services* (Aldershot, Arena, 1997) at 166. We should note that separation of purchaser and consumer occurs in the private sector as well (consider the insurance industry) and may lead to the problem of 'moral hazard' where the market is skewed because the consumer 'feels no pocketbook restraint' (Breyer, S., 'Typical Justifications for Regulation' in Baldwin *et al*, above n 2 at 79).

[110] See above Ch 1 nn 28 - 29 and associated text.

[111] The European Foundation Centre notes the 'the importance of operating in accordance with the wishes of founders who provide initial capital' (European Foundation Centre, *Principles of Good Practice* (www.efc.be, European Foundation Centre, 2002 web version), Preamble), whilst the Ontario Law Reform Commission emphasises the need for 'loyalty to purpose' (*Report on the Law of Charities* (Toronto, Ontario Law Reform Commission, 1996) at 9). See also Tasman Asia Pacific, *Analysis of Market Circumstances where Industry Self-Regulation is Likely to be Most and Least Effective* (www.selfregulation.gov.au, TaskForce on Industry Self-Regulation, 2000) at 27. However, whilst the need to protect the interests of founders may *prima facie* strengthen the argument for regulation, it is important that the 'dead hand' of the settlor does not needlessly hinder the operation of a CSO in later years (Simon, J., 'Modern Welfare State Policy Toward the Nonprofit Sector: Some Efficiency – Equity Dilemmas' in Anheier and Seibel, above n 73 at 41), particularly where the settlor's concerns do not relate to mismanagement or abuse but simply a change in direction or organisational ethos.

[112] The circumstances in which it will no longer be appropriate are: (i) where the original purpose has been fulfilled or can no longer be carried out 'in the spirit of the gift' (s 13(1)(a)); (ii) where the original purpose is such that only part of the gift is utilized (s 13(1)(b)); (iii) where the gift can be used 'more effectively' if combined with other resources (s 13(1)(c)); (iv) where the area of class of beneficiaries no longer exists (s 13(1)(d)); (v) where the original purpose is being fulfilled by other means (s 13(1)(e)(i)); (vi) where the original purpose is no longer a legally charitable one (s 13(1)(e)(ii)); and (vii) where the original purpose is no longer a 'suitable or effective' means of pursuing out the objective of the gift (s 13(1)(e)(iii)).

[113] See e.g. *Cook* v *Duckenfield* (1743) 2 Atk 562; *Re Avenon's Charity* [1913] 2 Ch 261.

case.[114] Third, the structure of a CSO will often exacerbate accountability issues. Although the directors of those CSOs constituted as companies limited by guarantee must, in theory, account to their members,[115] whilst staff of CSOs must account to their trustees, Rochester notes that the effectiveness of these mechanisms may be limited, for example: (i) where a board of lay trustees is intimidated by the expertise of employed staff;[116] (ii) where a CSO is based around a small group of entrepreneurs who act both as trustees and as workers;[117] or (iii) in the case of CSOs based on mutuality, where 'regular and close contact between the staff and members' may lead to problems of capture.[118]

Finally we should note that regulation to ensure the availability of operational information will also be of use from an evaluative perspective – detailed information about the sector may provide a basis for determining whether a given regulatory regime is effective, although we must of course be wary of regulating purely for statistical or mapping purposes.[119] Such information may also prove illuminating for the sector itself.[120]

Accountability or control?

We should also note briefly that, in certain circumstances, regulating to resolve information deficits might not in itself ensure the trustworthiness of the sector – particularly where donors do not have the time or resources to evaluate the information which is made available to them before making a donation. Where this is the case, it might also be appropriate to regulate so as to require organisations to meet certain standards in the course of their activities. This is a topic which we shall consider in more detail later.[121]

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[114] See e.g. *Attorney General* v *Ironmongers' Company* (1834) 2 My & K 576, where funds originally devoted to the redemption of slaves was applied *cy près* to educational establishments (noted in Luxton, P., *The Law of Charities* (Oxford, OUP, 2001) at 551).
[115] In a similar fashion to the way in which the directors of private firms are kept in check by shareholders (at least in theory: see above Ch 3 n 321).
[116] Above n 95 at 196.
[117] Above n 95 at 194 - 195.
[118] Above n 95 at 194.
[119] Voluntary Sector Roundtable, above n 95 at 12.
[120] Ontario Law Reform Commission, above n 111, Ch 1 at 9.
[121] See below Ch 6 at 222 – 226, Ch 7 at 234 – 238, also Ch 8 generally.

Co-ordination and irregularity of production

The final traditional justification for regulation is as a means of ensuring that the market is not disrupted by irregularity of production. Irregularity may be geographical, in that firms may be discouraged from supplying goods in remote areas if the supply costs are higher than in non-remote regions – a practice known as 'cream-skimming'[122] – or it may be temporal, in that there may be a scarcity of resources from time or time[123] or demand may be 'cyclical'.[124] Certain consumers may find that they are unable to purchase goods by virtue of their location or the timing of their need and, as a consequence, regulation to co-ordinate production may be necessary in order to ensure an appropriate level of availability. Further, where demand is cyclical, firms may find that they have to periodically close down and re-open according to whether demand is in a trough or at a peak, which will 'engender waste' from increased administrative costs.[125] Regulation may prevent this as well.

Irregularity of production is particularly significant in the context of organised civil society. According to Salamon's theory of voluntary failure,[126] CSOs will be limited in their ability to provide public goods where there is 'philanthropic insufficiency' and 'philanthropic particularism'.[127] The former will arise where the sector is unable to attract sufficient resources, either in general or in relation to specific activities, as a result of the free-riding phenomenon. Philanthropic insufficiency may, in turn, lead to philanthropic particularism, whereby activists sidestep activity *x*, which is unable to attract sufficient resources, and move towards activity *y*, which is. This is problematic for two reasons: first, it will mean that the donors who are willing to fund activity *x* may have no-one to deliver it; second, it risks the supersaturation of the provision of activity *y*.[128] These two forms of voluntary failure could be seen as justification for the

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[122] Ogus, above n 8 at 32.
[123] See Breyer, above n 15 at 11; Gellhorn and Pierce, above n 8 at 51 – 52; Ogus, above n 8 at 42; Sunstein, above n 21 at 45.
[124] Ogus, above n 8 at 43.
[125] Ogus, above n 8 at 43.
[126] See above Ch 3 at 72 - 81.
[127] See above Ch 3 at 79 - 80; Salamon, above n 95 at 44; Salamon, L., 'Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations' in Powell, above n 40 at 111 – 112.
[128] See above Ch 3 at 80; also Clark, J., 'The State, Popular Participation and the Voluntary Sector' in Hulme and Edwards, above n 73 at 51; Government of Canada Privy Council Office

state provision of public goods. However, it is submitted that regulation of organised civil society to control these problems is *prima facie* preferable, in light of the advantages that CSOs have over the state in terms of service provision – namely, efficiency, expertise and political insulation.[129]

Accumulation of reserves

At this point, we can briefly mention the issue of those CSOs that attempt to counter the unpredictability of raising funds through donations (or service provision) by accumulating reserve funds. We have already noted that this has been the subject of some media criticism, particularly in the context of charities;[130] indeed, Bennett and DiLorenzo suggest that such accumulation displays:[131]

> a mind-set which is incompatible with the ultimate goal … to conquer [a social problem] and go out of business as rapidly as possible.

Accordingly, some regulatory regimes place limits on the proportion of a CSO's income that may be withheld from being applied to its social functions in a given period.[132] However, although the accumulation of reserves may be incompatible with certain civil society activities – such as emergency appeals intended simply to tackle one-off problems on a short-term basis – as a general rule it is surely desirable that

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Voluntary Sector Task Force, *Partnering for the Benefit of Canadians: Government of Canada – Voluntary Sector Initiative* (www.pco-bcp.gc.ca, Government of Canada Privy Council Office, 2000) at 5; Knapp *et al*, above n 73 at 213 – 214; Taylor, M., 'What are the Key Influences on the Work of Voluntary Agencies?' in Billis and Harris, above n 95 at 23.

[129] See above Ch 3 at 73 - 79.

[130] See above Ch 2 n 115.

[131] Bennett and DiLorenzo, above n 79 at 82.

[132] See e.g. the Canadian Income Tax Act (RSC 1985, c 1 (5th Supplement)), s 149.1(1), which requires that charities, private foundations and public foundations satisfy a 'disbursement quota' requiring that they spend at least 80% of their donations each year on charitable activities, lest they lose charitable status (see above Ch 2 nn 57 – 58 and associated text). In the context of self-regulation (on which see below Ch 6 at 227 - 233), in the United States, where there is no such statutory requirement, the Council of Better Business Bureaus recommends that disbursement quotas are adhered to as a matter of good administration (Council of Better Business Bureaus, *Standards for Charitable Solicitations* (www.give.org, Better Business Bureau Wise Giving Alliance, 2002 web version), para B1; Better Business Bureaus Wise Giving Alliance, *Standards for Charity Accountability* (www.give.org, Better Business Bureau Wise Giving Alliance, 2003 web version), para 8). On a related point, the English Law Commission recommends that the trustees of charitable trusts should only be able to accumulate income for a maximum of 21 years (Law Commission, *The Rules against Perpetuities and Excessive Accumulations* (1998, Law Com No 251), para 10.21.

CSOs engage in long-term financial planning; indeed, many CSOs pursue functions that do not call for the 'conquering' of a social ill, but rather call for sustained activity – for example, educational organisations, healthcare providers and religious bodies.[133] Further, Ogus argues that, in the private market context, maintaining a reserve fund may obviate the need for state regulation on the basis of temporal irregularity of demand in that:[134]

> if such markets … anticipat[e] … recoveries in demand and the profits thereby engendered, they will furnish sufficient funds during the trough to maintain the firm's capacity.

Accordingly, regulatory provisions that limit the capacity of CSOs to build up reserves may prevent the sector from effectively resolving these problems without the need for state intervention.[135] It is perhaps worth noting that if regulation is in place to ensure the accountability of CSOs and the provision of operational information,[136] this may be a sufficient response to any concern regarding reserves, as it will enable those donors who disapprove of reserve funds to avoid those organisations that accumulate and patronise those that do not.[137]

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[133] In common law countries, the exemption of charitable trusts from the rule against perpetual duration (inalienability) suggests the implicit state recognition of the need to ensure the longevity of CSOs. On the exemption from the rule, see e.g. *Income Tax Special Purposes Commissioners* v *Pemsel* [1891] AC 531 at 580 – 581 *per* Lord Macnaghten. Note also the *cy près* doctrine, which operates to prevent funds from leaving the charitable sector (see above n 112 and associated text).

[134] Ogus, above n 8 at 43.

[135] It is important to note that we have already considered one of the advantages of CSOs is their ability to 'form and disband' with ease (Salamon, above n 95 at 44; see above Ch 3 at 73 - 75). This should mean that in some situations the problems of shutting down and restarting operations will be less pronounced than with the private sector; however, much will, of course, turn on the nature of the individual CSO – factors such as organisational size and the nature of its activities will obvious impact upon this.

[136] See above at 132 - 137.

[137] Indeed, this characterises the approach of the Charity Commission in England, which takes a neutral approach to the issue of reserves (Charity Commission, *CC19: Charities Reserves* (London, Charity Commission, 2002), para 3) but suggests that those charities that do accumulate funds should justify and explain their decision to do so (*ibid*).

(3) Traditional social justifications for regulation

Windfalls

Regulation is sometimes a response to windfall profits or economic rents – profits that accrue by virtue of some 'accident'[138] rather than the 'talents or skill' of the organisation in question.[139] An organisation might receive a windfall profit because a particular asset has suddenly appreciated in value[140] (for example, the discovery by an art dealer that a painting in her collection, previously thought to be of little value, is in fact a Rembrandt) or because it has happened upon an abundant source of a raw material required in the manufacture of its product[141] (for example, the discovery by a drinks manufacturer of a natural spring on its land). The justification for regulation in these types of situation is that, because the profit is simply the result of the organisation catching a lucky break, it is somehow 'undeserved'.[142] Accordingly, regulation may be used to redistribute the windfall so that others may benefit.[143]

It is apparent from the examples given above that CSOs, as well as private sector organisations, may receive windfall profits – for example, the undiscovered Rembrandt could be in the hands of a public art gallery rather than a private dealer, whilst the natural spring could be on land owned by a disaster charity that sends water supplies to areas of drought. However, the nature of CSO activity is such that regulation may not necessarily be an appropriate response to windfall profits:[144] unlike their private sector counterparts, windfall profits that occur within organised civil society – as with all other profits – will normally be applied to some social function as opposed to merely

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[138] Baldwin and Cave, above n 2 at 11.
[139] Breyer, above n 3 at 21. See also Breyer, above n 15 at 10; Gellhorn and Pierce, above n 8 at 52 – 54.
[140] Baldwin and Cave, above n 2 at 11.
[141] Baldwin and Cave, above n 2 at 11.
[142] Breyer, above n 3 at 22.
[143] For example, the high-profile one-off windfall tax levied by the Labour government in the UK in July 1997, which targeted privatised utility companies in an attempt to 'claw back' windfall profits that these companies were able to make by virtue of (i) the initial underpricing of their shares when privatisation occurred, followed by (ii) perceived lax regulation (Chennels, L., 'The Windfall Tax' (1997) 18 *Fiscal Studies* 279 at 280). The tax was then used to fund the 'welfare to work' initiative.
[144] Indeed, Baldwin and Cave note that it may not always be an appropriate response to windfall profits in the private sector, as it may remove 'incentives to search for new efficiencies, products, or areas of demand' (above n 2 at 11).

being distributed among investors.[145] It could be argued that a social function is, by definition, inherently deserving of any extra resources that it is able to attract; accordingly, regulation to prevent 'undeserved' profit is inappropriate. Furthermore, a windfall in the private sector will typically mean nothing more than a difference in profit margin,[146] but in civil society, it will have a direct impact on the scale and nature of activities a CSO can carry out in pursuit of its social function. However, regulation to redistribute windfall profits may be justified by reference to philanthropic insufficiency or particularism,[147] if the organisation in receipt of the windfall is operating in an area where resources are comparatively plentiful.

Other social goals

Redistribution of wealth

Regulation is sometimes justified on the ground of the redistribution of wealth.[148] Such regulation does not relate to any flaw in a particular industry or the market mechanism but is instead intended to override the natural distribution of wealth in order to achieve a more '"fair" or "just" distribution of resources'.[149] It would be inappropriate to discuss this justification for regulation in any detail, as the notion of what constitutes a just distribution of resources is dependent upon one's political standpoint. However, the fact that organised civil society is itself concerned with the redistribution of wealth, either as a direct social function or indirectly through reliance on donations,[150] may mean it is harder to justify state intervention than with the private market. We have already noted that there are reasons to believe that organised civil society is better able to judge certain social needs than the state.[151]

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[145] One notable exception is of course the social enterprise, the organisational form of which permits limited profit distribution, on which see below Ch 5 at 187 - 188. Mutual organisations that fall within organised civil society may distribute profits but will do so in pursuit of a social function: see generally above Ch 3 at 101 - 104.
[146] Of course, this will not necessarily be the case: a windfall in the private sector may enable a struggling company to turn itself around and avoid insolvency.
[147] See above at 138 - 139.
[148] See e.g. Ogus, above n 8 at 46 – 51.
[149] Ogus, above n 8 at 46.
[150] See above Ch 3 at 89 - 90.
[151] See above Ch 3 at 76 - 78.

Paternalism

Regulation is also sometimes justified on the ground that, in certain circumstances, individuals are not capable of making the rational choices with regard to utility maximisation that are necessary for markets to operate. Where this is the case, the paternalist response is for the state to make the decision for individuals instead so that their 'choices are overridden'.[152] There is nothing inherent in civil society activity that suggests this would be an appropriate justification for regulation of the sector; further, as with the redistribution of wealth, the appropriateness of paternalism depends on one's political standpoint.[153]

C. FURTHER JUSTIFICATIONS FOR THE REGULATION OF CIVIL SOCIETY

(1) Other philanthropic failures

We noted earlier that two of the four philanthropic failures noted by Salamon may warrant state intervention.[154] It is therefore appropriate to consider the remaining two – namely, philanthropic paternalism and philanthropic amateurism – at this juncture.

Philanthropic paternalism

Salamon suggests that problems may arise if civil society activity in a particular sphere is driven by social need as perceived by wealthy benefactors rather than social need as perceived by those who benefit from the activity.[155] Where this happens, CSOs may cause beneficiaries to feel stigmatised or debilitated by the feeling that they are reliant upon the benevolence of others. It is fair to assume that this phenomenon is, by its nature, one that this specific to those CSOs which operate on an altruistic basis rather than on the basis of mutual support.[156] It is unclear whether regulation will be an appropriate response to this philanthropic failure. There would appear to be three ways of alleviating the problem: (i) by changing public attitudes towards altruism so as

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[152] Ogus, above n 8 at 51.
[153] For a summary of the arguments for and against paternalism, see Ogus, above n 8 at 51- 53.
[154] See above at 138 - 139.
[155] See above Ch 3 at 80; also Salamon, above n 95 at 41; Salamon, above n 76 at 112.
[156] We have already noted that support groups may be funded by donations (see above Ch 3 at 103 - 104); where a CSO is organised partly on mutuality and partly on altruism, we may assume that a weakened version of the same stigmatisation may be manifested.

to minimise the negative connotations of reliance on the benevolence of others, (ii) by ensuring that the activities in question are funded by means other than the munificence of rich citizens, and (iii) by empowering those who are dependent on altruism, in order that they do not feel that they are in a position of comparative 'weakness'. The first, although something the state may attempt, cannot be considered 'regulation' in any meaningful sense, even on our broad definition of the term.[157] The second could be achieved in a number of ways – for example: (i) by decreeing that certain activities cannot be funded on a donative basis;[158] (ii) by encouraging relevant CSOs to look elsewhere for funding;[159] or (iii) by encouraging donors to give money to other causes.[160] Of course, the problem with each of these regulatory responses is that they presume the ready availability of alternative resources to fund the activities in question, which will not always be the case. Accordingly, it is difficult to separate philanthropic paternalism from the issues of philanthropic insufficiency and particularism discussed above.[161] The third method could be achieved simply by giving beneficiaries or users increased rights in relation to the CSOs with which they interact – for example, the right to a fair hearing before any benefits are withdrawn, or the right to be given the reasons for any decision by which they are affected. We shall consider this and other issues relating to the due administration of CSOs in detail in Chapter Eight.

Philanthropic amateurism

Salamon's final example of philanthropic failure is that of amateurism.[162] This may take two forms. First, certain civil society activities cannot be undertaken satisfactorily by volunteer efforts alone, but instead require the skills of qualified or experienced paid workers that a CSO may not be able to afford – consider schools and universities or healthcare providers. Second, civil society activities in general may

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[157] See above Ch 1 at 17.
[158] In other words, prohibit private donations to certain activities and insist instead that their funding must come either from government, service provision, corporate philanthropy or trading.
[159] E.g. by making it easier for organisations to engage in trading activities.
[160] E.g. by making certain activities tax-deductible but not others.
[161] See above at 138 - 139.
[162] See above Ch 3 at 81; also Salamon, above n 95 at 41; Salamon, above n 76 at 112 – 113.

suffer from an 'uneven or unpredictable' quality,[163] either as a result of the sector's emphasis upon volunteerism or because of the lack of profit maximisation driving organisational efficiency. The first form of amateurism may be treated as a form of philanthropic insufficiency and, as such, has already been dealt with above.[164] The second form of amateurism could be minimised with appropriate regulation – for example, by providing for minimum standards of professional behaviour to which trustees or CSO workers must adhere.[165] However, any regulation designed to 'professionalize' the sector would be at the risk of one of the four structural characteristics identified as defining the sector in Chapter Two – namely, volunteerism.[166] Accordingly, regulation may change the nature of regulated organisations in such a way that we may no longer consider them to fall within our definition of organised civil society; further, erosion of this characteristic may impact negatively on sector performance.[167]

(2) Challenges to quiddity

In the second chapter we considered the four shared structural characteristics identified by Salamon and Anheier that, whilst not all exhibited by every organisation, we would generally expect CSOs to demonstrate – namely, independence, organisation, volunteerism and non profit distribution.[168] In addition to assisting our map of organised civil society, these characteristics go some way towards explaining civil society presence in relation to the eight social functions discussed in the previous chapter. Accordingly, erosion of these key characteristics may have a negative impact on the sector's activities. It may therefore be appropriate for the state to regulate so as to prevent any serious challenges to organisational quiddity. We have already considered when it may be appropriate to regulate in order to ensure non profit

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[163] Smith, S., and Lipsky, M., *Nonprofits for Hire: The Welfare State in the Age of Contracting* (Cambridge, Massachusetts, Harvard University Press, 1993) at 113.
[164] See above at 138.
[165] On which, see below Ch 6 at 222 – 226, Ch 7 at 234 – 238, also Ch 8 generally.
[166] See above Ch 2 at 49 - 50.
[167] See further below at 147 - 148.
[168] See above Ch 2 at 49; also Salamon, L., and Anheier, H., Salamon, L., and Anheier, H. (eds.), *Defining the Nonprofit Sector: A Cross-National Analysis* (Manchester and New York, Manchester University Press, 1997) at 33 – 34.

distribution; it is therefore prudent to consider the remaining characteristics at this juncture.

Independence

Loss of independence may have a number of ramifications for the effectiveness of a CSO. We have already noted that one of the three significant advantages that the sector has over the state in relation to the provision of public goods is its relative political insulation,[169] which in turn results from the sector's perceived independence from the state; further, political independence is a pre-requisite of effective CSO advocacy.[170] Independence from external influences other than political ones is also necessary if the sector is to remain trustworthy in the eyes of donors.[171] Accordingly, two of our previous justifications for regulation – the need to (i) control political campaigning[172] and (ii) remedy information deficits[173] – may be justified by reference to this structural characteristic.

Organisation

The idea that CSOs must be organised is largely a definitional requirement, intended to distinguish the activities of the sector from those of the family sector. However, there are a number of organisational issues that may impact upon the sector's operation. First, we have already noticed that although CSOs tend to be relatively small organisations when compared with state institutions, this is not always the case, and certain CSOs operating in well-resourced fields may have more in common, structurally speaking, with large corporations or government departments than with their smaller civil society brethren.[174] Salamon suggests that one of the three key advantages that the sector has over the state in relation to public goods is its comparative organisational efficiency, which stems from the typically small size of CSOs.[175]

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[169] See above Ch 3 at 78 - 79.
[170] See above Ch 3 at 95.
[171] See above Ch 3 at 67, 69.
[172] See above at 129 - 131.
[173] See above at 131 - 137.
[174] See above Ch 3 at 74 - 75.
[175] Salamon, above n 95 at 39.

There may therefore be a *prima facie* case for regulating the sector so as to limit the size of its constituent organisations. Nevertheless, it is clear that there are advantages in permitting CSOs of all sizes – for example, larger organisations are likely to have greater political influence than smaller organisations, and economies of scale may mean that a single larger organisation may in fact be more efficient than two smaller, distinct organisations.[176] Hence, it is not clear that regulation will necessarily be appropriate in this regard. However, organisational size may reinforce the need for regulation in relation to other justifications – for example, a large CSO may be better able to use excessive competition to force rivals out of business, whilst the larger the organisation, the more likely it will be that 'policy-making and implementation' are separated, which may exacerbate issues of accountability.[177]

Volunteerism

The final structural characteristic we considered in Chapter Two is volunteerism. It seems likely that this plays at least some part in creating the 'civil society ethos' that we have already noted attracts entrepreneurs to the sector.[178] Accordingly, if it were shown that a lack of volunteerism impacted detrimentally upon this, then regulation might be justified.[179] However, empirical research carried out as part of the Johns Hopkins Comparative Nonprofit Sector Project suggests that the extent to which volunteering is significant to the sector varies across both industries and jurisdictions.[180] It appears that volunteerism in the UK is particularly important in

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[176] Consider, for example, the merger between the Imperial Cancer Research Fund and the Cancer Research Campaign in February 2002, which was intended to increase the organisations' collective funding budget by reducing administrative costs (see Torkar, M., 'Charity merger streamlines UK cancer research' (2002) *ELSO Gazette* 1). On charity mergers generally, see Morris, D., *Legal Issues in Charity Mergers* (Liverpool, Charity Law Unit, University of Liverpool, 2001); Warburton, J., *Mergers: A Legal Good Practice Guide* (Liverpool, Charity Law Unit, University of Liverpool, 2001).

[177] Leat, above n 95 at 64.

[178] See above Ch 3 at 111.

[179] Kendall and Knapp note the need for regulation to encourage volunteerism: above n 94 at 254 – 257.

[180] See Salamon, L., Sokolowski, S., and List, R., *Global Civil Society: An Overview* (Baltimore, Centre for Civil Society Studies, Johns Hopkins University, 2003) at 15 – 21; 23 – 26. This research suggests that in developed nations volunteers are particularly significant in relation to the provision of cultural services and the facilitation of political action, as well as certain public goods (environmental protection) and intangible private goods (recreational services), particularly as opposed to service provision, where paid staff dominate (*ibid* at 23 –

relation to certain public goods (specifically, environmental protection and community development), certain complex private goods (specifically, healthcare), the facilitation of political action, and the facilitation of self-determination (specifically, religious activities).[181] However, we have already noted that, even in those spheres where volunteerism plays a significant role, there may be sound reasons why an organisation might wish to rely on paid workers rather than volunteers – for example, where an activity requires a stable workforce or particular expertise, or where it is possible for a CSO's beneficiaries to pay for services themselves rather than rely on the donations of others. Hansmann also notes that volunteerism must be balanced against the need to ensure some level of organisational efficiency.[182]

(3) Fostering the sector

Regulation is sometimes justified, by both commentators and official publications, by reference to a perceived general need to foster organised civil society and provide a 'hospitable environment that encourages a high level of … sector activity'.[183] Indeed, the Charities Act 1993, s 1(3) charges the Charity Commission with:[184]

> the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity …

whilst s 1(4) provides that:

> It shall be the general object of the Commissioners so to act in the case of any charity … as best to promote and make effective … [its] work …

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24). In developing and transitional nations, volunteers play a more significant role in service provision than in their developed counterparts (*ibid* at 25). See also generally Salamon, L., Anheier, H., List, R., Toepler, S., Sokolowski, S., and Associates, *Global Civil Society: Dimensions of the Nonprofit Sector* (Baltimore, Johns Hopkins Center for Civil Society Studies, 1999).

[181] Kendall, J., and Almond, S., 'United Kingdom' in Salamon *et al*, *ibid*, at 183 – 184.

[182] Hansmann, above n 103 at 81.

[183] Simon, above n 111 at 34. See also e.g. Home Office, *Home Office Annual Report 1998 – 99* (London, HMSO, 1998) at 24.1 and 24.13;

[184] We have already noted that the Charities Bill 2004 will replace this broad legislative mandate with a detailed provisions with regard to its regulatory and advisory functions (see above Ch 1 nn 67 – 74 and associated text).

It is inappropriate to consider this rather vague justification in any detail. Regulation that is not designed to remedy a specific, identifiable problem cannot be justified by reference to any objective criterion. Rather, its validity depends on the extent to which one believes it acceptable for the state to interfere in a functioning social sphere. We can, however, briefly note that regulation not aimed at a specific ill may be more difficult to defend against charges of juridification when compared with the justifications detailed above.[185] A good example of this is the suggestion, posited in a number of reform proposals, that regulation can be justified by reference to the need to ensure the 'modernisation' of the sector, in order to ensure its ability to 'keep pace with social developments'.[186] We have noted elsewhere that CSOs have a strong tradition of innovation[187] and so, in the absence of any specific problems affecting the sector in this regard, regulation to 'modernise' organised civil society may serve little purpose beyond replacing the organic structures which naturally govern the sector's operation with a formalistic legal equivalent.[188]

D. LIMITATIONS OF REGULATION

Having considered the economic and social justifications for regulating organised civil society, it is prudent at this point to say a few words on the limitations of regulation as a response to problems in the operation of the sector. As with any sector or industry, it may be inappropriate for the state to respond to a monopoly at all if the regulatory strategy is poorly designed or badly implemented as this may cause more problems than it solves.[189] However, where regulation is experimental – for example, if there is

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[185] See below at 150.

[186] National Council of Voluntary Organisations Charity Law Reform Advisory Group, *For the public benefit?* (London, NCVO, 2001), para 2.5. See also Charity Commission, *RR1: The Review of the Register of Charities* (London, Charity Commission, 2001), para 2.

[187] See above Ch 3 at 106 - 108.

[188] Of course, it may be that problems in this area may arise by virtue of a flawed pre-existing regulatory regime that operates to hold the sector back. In this context, justifying a new regulatory regime on the ground of modernisation may be acceptable (consider e.g. the Charity Commission's stated purpose of its Review of the Register: 'to develop further the boundaries of charitable status' (above n 186, para 2)). However, this is, of course, not a justification for regulation *per se*, merely a justification for preferring one system of regulation over another.

[189] See Ogus, above n 8 at 30. Regulation may operate to damage the regulated organisations or may be inherently flawed (e.g. through regulatory capture (see e.g. Makkai, T., and Braithwaite, J., 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' in Baldwin *et al*, above n 2) or lack of accountability (see e.g. Graham, C., 'Is there a crisis in regulatory accountability' in Baldwin *et al*, above n 2)). We shall consider the potential

a lack of empirical evidence to confirm or deny the theories upon which it is based – then it may not be possible to adduce its 'quality' in this respect prior to implementation.[190]

(1) Juridification

At a basic level, juridification refers simply to the over-proliferation of legal rules in a given area.[191] It is clearly in the interests of proportionality and targeting that a particular regulatory goal is achieved through rules that are no more complex, or greater in number, than necessary. In this sense, juridification is an issue of general regulatory concern and not specific to the regulation of civil society. Hence, it is not appropriate to discuss this in any detail here. However, juridification is also used to refer to the situation whereby a regulatory strategy recognises the informal structural characteristics that govern the operation of a particular social sphere and attempts to replicate these with a set of rules which it then imposes on the sphere in question. As noted above, this phenomenon is likely to be associated with regulation that attempts to 'improve' the sector's performance generally rather than that which responds to specific areas of concern. Leaving aside the issue of whether we believe this to be an appropriate justification for regulation, there is a risk that any legal rule designed to replicate and supplant a natural rule will be, at best, a crude approximation of its counterpart: it is unlikely that any legal rule, however well-drafted, will be able to reflect fully the infinite subtleties of a naturally occurring phenomenon.[192]

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problems with different regulatory strategies in the context of organised civil society in Chs 5 – 7 below.

[190] In which case, it may be necessary to design regulation solely on the basis of informed theory and then simply 'try it and see' with the expectation that modifications will be necessary once its impact has been measured.

[191] See generally Teubner, G., 'Juridification: Concepts, Aspects, Limits, Solutions' in Baldwin *et al*, above n 2; Teubner, G. (ed.), *Juridification of Social Spheres* (Berlin, Walter de Gruyter, 1987); also below Ch 5 at 156, Ch 6 at 216 – 220, Ch 8 at 236 - 238.

[192] We might note that the potential juridification of organised civil society has received attention in the context of the European Union, following the European Commission's *European Governance: A White Paper* COM (2001) 428, which proposes a code of conduct for the sector to 'identify responsibilities and improve accountability of all partners .... [and] enhance dialogue, and contribute to the openness of organized civil society' (at 33). Armstrong notes that the effect of this may be that 'the voices of national civil society actors may be lost or excluded as civil society becomes Europeanised and autonomised' (Armstrong, K., 'Rediscovering Civil Society: The European Union and the White Paper on Governance' (2002) 8 *European Law Journal* 102 at 115; see also Armstrong, K., 'Civil Society and the

(2) Contradicting regulatory goals

Finally, we should note briefly that the justifications for regulation detailed above will not always be happy bedfellows, and so an effective regulatory strategy may be required to effect a compromise between competing goals. For example, regulation to ensure the accountability of CSOs, in order to minimise information asymmetry, may have implications for the sector's volunteerism,[193] independence,[194] and role as innovator,[195] whilst regulation to ensure the independence of the sector may have implications with regard to co-ordination of resources.

E. CONCLUSION

This chapter has sought to argue that some form of state regulation of organised civil society as a collective unit can *prima facie* be justified by reference to six overlapping grounds: (i) preventing anti-competitive practices, (ii) controlling campaigning, (iii) ensuring accountability, (iv) co-ordinating the sector; (v) rectifying philanthropic failures and (vi) preventing challenges to organisational quiddity. In the following chapter we will consider some of the problems with treating organised civil society as such a collective unit for the purpose of regulation in light of the lack of a discretely defined boundary around the sector.

White Paper – Bridging or Jumping the Gaps?' in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No 6/01 (www.jeanmonnetprogram.org, Jean Monnet Program, 2001) at 5).

[193] Voluntary Sector Roundtable, above n 95 at 12.

[194] Simon, above n 95 at 3.

[195] Langton, S., 'The New Volunteerism' (1981) 10 *Journal of Voluntary Action Research* 7 at 16.

CHAPTER 5

Boundaries of Civil Society Regulation

A. INTRODUCTION

From a regulatory perspective, there are a number of limitations inherent in our preceding analysis; these must be dealt with at this juncture. Any sector-based analysis of society depends upon the premise that it is possible to distinguish CSOs from private sector organisations and emanations of the state. This is certainly true in respect of those organisations which operate at the core of each sector – for example, if we consider a government department, a bookshop and a reading group, there is *prima facie* nothing objectionable in holding that the first falls within the public sector, the second within the private sector and the third within organised civil society. However, towards the outer edges of each sector, categorisation becomes harder as organisations fail to adhere to the

> artificial and academic distinctions imposed on what is … the seamless web or the institutional fabric of society.[1]

Accordingly, the first part of this chapter is an attempt to refine our analysis of organised civil society by examining in detail the relationship between it and the public and private sectors. In particular, the chapter examines the issues of (i) the blurred nature of the sector boundaries, (ii) functional overlap and (iii) cross-sector interaction.

The second half of the chapter examines a rather different, but equally significant boundary dispute: the relationship between the charitable sector and wider organised civil society. It explains further why our theory of regulation takes a broad, functional definition of the sector as its basis,[2] rather than focusing simply on the charitable sector as many jurisdictions have chosen to do in practice. Specifically, it argues that regulation of the charitable sector in isolation is untenable because (i) no meaningful distinction between this and wider organised civil society can be drawn on the basis of

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[1] Douglas, J., 'Political Theories of Nonprofit Organizations' in Powell, W. (ed.), *The Nonprofit Sector: A Research Handbook* (New Haven and London, Yale University Press, 1987) at 53.

[2] See also above Ch 2 at 44 - 47.

either organisational structure or social function and (ii) the reasons traditionally given by successive governments for treating charities as a special case are inadequate. This is particularly significant in light of the fact that the jurisdictions identified in Chapter One as being currently in the process of introducing new, or reforming existing, systems of regulation continue to focus on the charitable sector.[3]

B. THE RELATIONSHIP BETWEEN CIVIL SOCIETY, THE MARKET AND THE STATE

(1) Blurred nature of sector boundaries

It will be apparent from Chapters Two and Three that it is not possible to draw a clear line marking where organised civil society ends and the other sectors begin. First, there is no consensus as to where such a line should lie. Fee-paying public schools, for example, could be seen as either CSOs or private organisations – in England, these have charitable status under the second head of *Pemsel*,[4] but as organisations 'engaged in the market production of goods and non-financial services' they are classed as private sector organisations under the UN System of National Accounts.[5] Likewise, in the previous chapter we saw that religious groups can be regarded as part of organised civil society[6] – in England, many will obviously fall under the third head of charity[7] - but where a church is established, some may prefer to class it as a public body; some theorists even exclude religious organisations *per se* from their map of the sector.[8] Housing associations, meanwhile, carry out an appropriate social function – we have already noted the fact that the provision of social housing facilitates wealth redistribution;[9] many also facilitate entrepreneurship and political action[10] – yet we might question the extent of the sector's independence from the state, in light of the

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[3] Namely Canada, England, New Zealand and Scotland. See above Ch 1 at 19 - 26.
[4] *Income Tax Special Purposes Commissioners* v *Pemsel* [1891] AC 531.
[5] UN System of National Account 1993, para 4.7 (more specifically, they are classed as being part of the 'non-financial corporations sector').
[6] See above Ch 3 at 105.
[7] Although those CSOs which are registered under the Places of Worship Act 1855 are not required to register as charities by virtue of the Charities Act 1993, s 3(5).
[8] E.g. Kendall, J., and Knapp, M., 'A loose and baggy monster: boundaries, definitions and typologies' in Davis Smith, J., Rochester, C., and Hedley, R. (eds.), *An Introduction to the Voluntary Sector* (London and New York, Routledge, 1995) at 19.
[9] See above Ch 3 at 89.
[10] See Kendall, J., *The Voluntary Sector* (London, Routledge, 2003) at 144 – 148.

extensive public funding of registered social landlords through the Housing Corporation.[11] A further problem is the fact that even if it were possible to draw a line, however blurred, between the sectors, it is unlikely to remain static over any length of time. As the National Council for Voluntary Organisations has observed, 'the boundary between the sectors has never been watertight',[12] and an industry that begins life as the preserve of one sector may become subsumed by another over time. Four industries that we noted in Chapter Three as examples of organised civil society's entrepreneurialism – the prison service, transport infrastructure, public libraries and healthcare – are illustrative of this point, each beginning life as part of organised civil society before subsequently being adopted by the state. All but one of these industries, public libraries, also now have a significant private sector presence: at the time of writing there are nine private sector prisons;[13] the railway system was privatised in 1995, whilst in March 2003 the Labour government agreed a 30 year plan with three private sector consortiums for the funding and maintenance of the London underground under the 'Transport for London' initiative; and in 1999, the last year for which official figures are available, there were 294 private hospitals offering acute medical treatment.[14]

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[11] Indeed, the Committee on Standards in Public Life classes registered social landlords as 'local public spending bodies' in light of this (Committee on Standards in Public Life, *Second Report of the Committee on Standards in Public Life: Local Public Spending Bodies* (Cm 327-I, 1996), Ch 5; noted by Wigglesworth, R., and Kendall, J., *The Impact of the Third Sector in the UK: the Case of Social Housing (Civil Society Working Paper No. 9)* (www.lse.ac.uk/collections/CCS/pdf/cswp9.pdf, Centre for Civil Society, 2000) at 16). In the US context, housing associations have been cast as 'textbook examples of public-private partnerships' (Anheier, H., *Nonprofit Organizations: Theory, Management, Policy* (Abingdon, Routledge, 2005) at 103). However, we have already considered that, under the definition of a CSO we have adopted, an organisation might not exhibit all the shared structural characteristics identified in Ch 2 (see above at 49); accordingly we do not exclude housing associations from the scope of this thesis.

[12] National Council of Voluntary Organisations Charity Law Reform Advisory Group, *For the public benefit?* (London, NCVO, 2001), para 2.2.10.

[13] The first of these, HM Prison Altcourse, opened on 1 December 1997.

[14] Parliamentary Select Committee on Health, *The Regulation of Private and Other Independent Healthcare* (HC Paper No. 281-I, 1999), para 12. See generally below at 158 – 162.

Impact on regulation

The blurred nature of the boundaries between organised civil society and the other sectors poses something of a problem when it comes to defining the scope of sector-based regulation. It has been said that good regulation should be 'no heavier, nor cut more deeply, than is necessary'.[15] In other words, regulation should be proportionate, striking an appropriate balance between precision and flexibility. Although the status of proportionality within the framework of administrative law in general is somewhat uncertain,[16] its importance in the context of regulation appears to be settled.[17] Proportionality is relevant on three levels of regulatory design, relating to: (i) the jurisdictional span of any given regulatory strategy; (ii) the nature of the individual rules within that strategy;[18] and (iii) the co-ordination of those individual rules.[19] We shall deal with the second and third levels of regulatory design at a later stage, when we consider the implementation of our regulation theory.[20] For current purposes, we are interested in how we might go about determining the operating boundary of our regulatory strategy, given the lack of any clearly defined perimeter around organised civil society.

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[15] Simon, K., *Principles of Regulation for the Not-for-Profit Sector* (www.icnl.org, International Center for Not-for-Profit Law, 1998) at 246.

[16] Although in *R* v *Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 the House of Lords explicitly rejected this as a general ground of judicial review in relation to domestic law, the idea that public bodies must act in a proportionate fashion is fundamental to both EU law (see e.g. *R* v *Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129) and also the Human Rights Act 1998. Furthermore, Craig identifies a number of domestic cases outside the context of human rights where, despite *Brind*, decisions have explicitly or implicitly turned on the issue of proportionality (Craig, P., *Administrative Law* (London, Sweet and Maxwell, 2003) at 619 – 620.

[17] Proportionality has been officially 'recognised' as one of five essential features of good regulation (Cabinet Office Better Regulation Task Force, *Principles of Good Regulation* (London, Better Regulation Task Force, 2003) at 2 and 4). See also Baldwin, R., *Rules and Government* (Oxford, Clarendon Press, 1995) who notes that targeted regulation is essential in securing compliance at 157; Irish, L., *The Role of a Good Legal Framework – Capacity Building and Sustainability* (www.icnl.org, International Center for Not-for-Profit Law, 1999) at 2.

[18] See generally Diver, C., 'The Optimal Precision of Administrative Rules' (1983) 93 Yale LJ 65.

[19] E.g. the graded accounting and reporting requirements for charities: see generally, Charity Commission, *CC61: Charity Accounts: The Framework* (London, Charity Commission, 2002).

[20] See below Ch 6 at 216 - 220.

Regulation ideally should be (i) sufficiently tight that it does not affect *x*, an organisation which falls outside organised civil society, but also (ii) sufficiently flexible that *y*, an organisation which falls inside organised civil society but is in some way novel, and whose presence has not specifically been accounted for, can be included without too much difficulty. Ideally this balance should be struck in such a way that *z*, any given organisation, knows whether it falls within the regulated sector, and can order its affairs accordingly. The previous chapter argued that several of the justifications for regulating organised civil society apply to the whole of the sector.[21] If we therefore wish to include all CSOs within our regulatory strategy,[22] then we are faced with a problem. Because the theories of organised civil society reveal no natural boundary, it will be difficult to cast the net of regulation so as to achieve this balance by reference to a tight definition that does not create grey areas – in other words, the sort that would allow us to draw up a complete list of regulated organisations if we so wished.

By way of comparison, let us imagine that we have decided that the only CSOs that warrant regulation are those that work with children, because we think that children are inherently vulnerable and in need of protection.[23] Because the relevant CSOs constitute a relatively discrete group – either the staff or volunteers of organisation *x* work with children or they do not – it would seem tolerable to use a definition with minimal or no flexibility. Accordingly, a hypothetical piece of regulation might be targeted at 'organisations that have workers who deal, in the course of their work, with those under the age of eighteen'. We might then wish to tweak this slightly – for example, define what we mean by 'work' and define workers to include volunteers – but the benefits of this tight regulation are obvious: the mischief would be targeted without affecting those organisations that are not engaged in relevant activities. The loose nature of organised civil society as a whole, however, is such that a black and white test of this kind would inevitably be either over- or under-inclusive. This problem is exacerbated by the fact that the edges of the sector, such as they are, fluctuate over time. Hence, even if we were to compromise and settle upon a tight definition in the interests of certainty, this is unlikely to remain effective over time.

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[21] See above Ch 4 generally.
[22] See above Ch 4 at 115.

This problem has been recognised by both the courts and Parliament in their development of modern charity law. The definition of legal charity is not a model of precision but rather, in the words of Luxton, 'a work of art'.[24] From its inception:[25]

> the Statute of Elizabeth … made it clear that at least the purposes enumerated in the preamble were charitable, but … it appears to have been assumed that the enumeration was not exhaustive and that those purposes also were charitable which could be fairly regarded as within its spirit and intendment. This view enabled the court to extend its protection to a vast number of objects which appeared both to the charitable donor and to it to be for the benefit of the community.

The development of charity law by the courts has been effected on this basis ever since: consider the flexibility of the four heads of charity as they currently stand.[26] Reform proposals have also tended to favour a loose definition of charity – either maintaining the current approach or an approximation of the same,[27] or one looser than the current position, such as a definition based solely on public benefit.[28] The Charities Bill maintains this approach, supplementing its eleven purposes with a catch-all category of 'any purposes that may reasonably be regarded as analogous' either to those statutory purposes or to purposes which are themselves analogous to the statutory purposes.[29] However, despite the flexibility inherent in both the existing and

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[23] On the protection of vulnerable parties, see above Ch 4 at 128 - 129.
[24] Luxton, P., *The Law of Charities* (Oxford, OUP, 2001) at 111.
[25] *National Anti-Vivisection Society* v *Inland Revenue Commissioners* [1948] AC 31 at 64 *per* Lord Simonds.
[26] On the breadth of charitable purposes, see below at 182 - 183.
[27] E.g. Committee on the Law and Practice relating to Charitable Trusts (Nathan Committee), *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmnd 8710, 1952); Goodman Committee, *Report of the Goodman Committee: Charity Law and Voluntary Organisations* (London, Bedford Square Press, 1976); Home Office, *Charities: A Framework for the Future* (London, HMSO, Cmnd 694, 1989).
[28] E.g. Deakin Commission, *Meeting the Challenge of Change: Voluntary Action into the 21st Century* (London, National Council for Voluntary Organisations, 1996), para 3.2.6; Scottish Charity Law Review Commission, *Charity Scotland The report of Scottish Charity Law Review Commission* (www.scotland.gov.uk/justice/charitylaw/csmr/csmr-00.htm, Scottish Charity Law Review Commission, 2001), recommendation 2; also House of Commons Expenditure Committee, *Charity Commissioners and their Accountability* (HC 495-I, 1975), noted in Luxton, above n 24 at 25.
[29] Charities Bill 2004, s 2(4). Furthermore, this flexibility is regularly tested by virtue of the fact that charitable trusts do not need to demonstrate conceptual certainty in relation to their objects, unlike their private counterparts (see e.g. *Inland Revenue Commissioners* v *Broadway*

proposed definitions of charity, it is clear that a significant proportion of organised civil society – particularly political CSOs, mutuals and social enterprises – falls outside the charitable sector. We shall return to this issue below when we consider the relationship between organised civil society and the charitable sector.[30]

(2) Functional overlap

The boundary between organised civil society, the market and the state becomes even fuzzier when we take account of the fact that there are a number of areas of activity in which more than one sector is present[31] – for example, all three sectors have a presence in the fields of education,[32] healthcare[33] and even financial services.[34] In fact, this is one of the reasons why we found it necessary also to define CSOs by reference to their structural characteristics, as we did in Chapter Two.[35] As no social function is the exclusive preserve of civil society,[36] we require more information than simply the nature of the activities in which it is engaged in order to classify an organisation as belonging to the sector. This may have implications for any regulatory strategy. First, where more than one sector is present in a particular social sphere, sector-based regulation may result in organisations engaged in identical activities being subjected to

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Cottages Trust [1955] Ch 20; *McPhail* v *Doulton* [1971] AC 424): were this not the case, settlors would be encouraged to draft more precise objects, which would in turn result in fewer cases before the courts pushing at the boundaries of charity law.

[30] See below at 177 - 205.

[31] See generally Weisbrod, B. (ed.), *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector* (Cambridge, CUP, 1998), especially: Weisbrod, B., 'The Nonprofit Mission and its Financing: Growing Links Between Nonprofits and the Rest of the Economy' (*ibid*); also Tuckman, H., 'Competition, Commercialization, and the Evolution of Nonprofit Organizational Structures' (*ibid*) at 37.

[32] Consider state-run comprehensive schools, charitable public schools and private tuition. See also below nn 90, 91 and associated text; also Cain, L., and Meritt Jnr, D., 'Zoos and Aquariums' in Weisbrod, above n 31; Anheier, H., and Toepler, S., 'Commerce and the Muse: Are Art Museums Becoming Commercial?' in Weisbrod, *ibid*.

[33] Consider the National Health Service, BUPA and charitable hospitals. In the United States context, see generally Sloan, F., 'Commercialism in Nonprofit Hospitals' in Weisbrod, above n 31; also Young, D., 'Commercialism in Nonprofit Social Service Associations: its Character, Significance, and Rationale' in Weisbrod, *ibid*.

[34] Although more typically the preserve of the private sector, consider the Bank of England and financial mutuals. There is now also charitable sector presence: see *Decisions of the Charity Commissioners*, 1 November 2002 (where the Commission held that the Charity Bank Ltd is a charitable company; its purpose is to provide loans and guarantees to charities, and for charitable purposes, at favourable rates (at 1)).

[35] See above Ch 2 at 48 - 54.

different constraints and rewarded with different incentives. This would violate the idea that regulation should be 'even-handed' and treat like cases in a consistent manner,[37] which has been identified by Baldwin and Cave as one of the key tests of 'good' regulation'.[38] This is why our theory of regulation posited in Chapter Four focuses upon issues that are of sector-based, rather than activity-based, concern.[39] Second, because the sectors do not operate in isolation, changes which are brought about in one may have an impact upon the others: thus policy *x*, targeted at organised civil society, may have unforeseen consequences for the state and the market. It may therefore sometimes be appropriate to regulate solely based on social function, rather than social sector.[40]

A third problem is that organisations that operate in the sector with the heaviest regulation may decide to reconstitute themselves to enable them to join the sector with the weakest regulation.[41] Alternatively, organisations that operate in the sector with the least state support may decide to reconstitute themselves so they can join the sector with the most. This is not as fanciful as it might first sound: Anheier notes that in Greece, there is a trend for private foundations to reconstitute themselves as public foundations where lack of resources threatens their future;[42] in Italy, the opposite trend is evident in relation to CSOs engaged in the provision of cultural services.[43] In the English context, this sector shift could, in many cases, be done with relative ease. The change from private sector firm to CSO could be effected simply by making the

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[36] On those social functions which the sector shares with the market, see below at 167 - 168.
[37] Simon, above n 15 at 246.
[38] Baldwin, R., and Cave, M., *Understanding Regulation Theory, Strategy, and Practice* (Oxford, OUP, 1999) at 76 and 79. Of course, even if organisations across the sectors are functionally the same, they may have different structural characteristics that could justify separate treatment.
[39] See above Ch 4 at 115.
[40] We shall consider in the third part of the thesis the issue of whether there should be an integrated regulatory policy effective across all sectors – see below Ch 6 at 215, 226.
[41] See Goddeeris, J., and Weisbrod, B., 'Conversion from Nonprofit to For-Profit Legal Status: Why Does it Happen and Should Anyone Care?' in Weisbrod, above n 31 at 135 – 136. An organisation may also take advantage of differences in regulatory regimes by forming a relationship with an organisation in the rival sector, rather than joining the rival sector outright: see Weisbrod, *ibid* at 18 (on collaborations across sector boundaries, see Tuckman, above n 31 at 40 – 42).
[42] Anheier, H., 'Foundations in Europe: a Comparative Perspective' in Schlüter, A., Then, V., and Walkenhorst, P. (eds.), *Foundations in Europe Society Management and Law* (London, Directory of Social Change, 2001) at 44.

change from operating on a for-profit basis to a non-profit basis (although making the change from private firm to charity is, of course, rather more complicated).[44] This may require creating another legal vehicle and transferring the assets of the original organisation across to it. Although a public company may re-register as a company limited by guarantee (the typical corporate form for a CSO),[45] a private company limited by shares (a typical vehicle for private enterprise) may not.[46] However, this restriction can be circumvented, as a private company limited by shares can re-register as a public company and then use the statutory provisions to convert to a company limited by guarantee.[47] There has also been at least one instance of a private company limited by shares turning itself into a charity without any re-registration. In *The Abbey, Malvern Wells Ltd* v *Ministry of Local Government and Planning*,[48] the three shareholders of a school for girls constituted as a company limited by shares transferred their holdings to a board of trustees to be held for the benefit of the school. Danckwerts J held that the trust deed prevented the company from being operated for private gain,[49] as any profits were required to be fed back into the school, and accordingly found the company to be charitable.[50] Luxton advises against this approach on the ground that it requires the corporate veil to be pierced, which the Charity Commission may not be prepared to do;[51] in any case, though, it would be a simple matter to set up a new guarantee company and transfer the assets across if the owners so wished.

The change from CSO to private sector organisation is more complicated, particularly when the CSO in question has charitable status. A company limited by guarantee

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[43] Anheier, above n 42 at 44.

[44] As this would require an organisation to: (i) ensure that it operates for exclusively charitable purposes, which may require a change to its stated objects; (ii) ensure that it satisfies the public benefit test; and (iii) go through the Charity Commission's registration process.

[45] Companies Act 1985, s 53(3).

[46] By virtue of the statutory provisions for other types of re-registration, it is generally accepted that this would require express statutory provision; the Companies Act 1985 contains no such provision. See Mayson, S., French, D., and Ryan, C., *Mayson, French and Ryan on Company Law* (London, Blackstone Press, 2002) at 60.

[47] Companies Act 1985, ss 43(1), 53(3).

[48] [1951] Ch 728.

[49] Above n 48 at 735.

[50] Above n 48 at 740.

[51] Luxton, above n 24 at 277.

cannot be converted into company limited by shares under any circumstances.[52] It can re-register as an unlimited company,[53] but the unlimited liability of members is unlikely to make this an attractive proposition.[54] More significant is the fact that, although a new for-profit organisation could be created, any assets owned by the CSO would only be free for the new organisation to utilise if the CSO does not have charitable status: once monies have been committed to charity, the law does not permit them to be applied to non-charitable purposes.[55] Where the CSO is a charity, this could happen in one of four ways. First, if the CSO is based upon a charitable trust (either alone or as part of an unincorporated association) and funds are transferred across, the new organisation will simply hold the funds on the same charitable trust as the previous trustees,[56] who will be liable for breach of trust if they have applied the trust's assets for a non-charitable purpose (*videlicet*, to resource their new for-profit organisation).[57] Second, if the CSO is a charitable company, although there would be no initial charitable trust, a constructive trust in favour of the charitable purpose would presumably be imposed on the assets and thus restrict the new organisation in much the same fashion; certainly this is the case where a charitable company alters its objects so that they are no longer exclusively charitable,[58] and there can be no

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[52] For the same reasons given above n 46.
[53] Companies Act 1985, s 49(1).
[54] Although an unlimited company may normally re-register as a company limited by shares (Companies Act 1985, ss 51 – 52); this would not avail a CSO in the process of transition, as re-registration is not permitted where the unlimited company was previously a private limited company (ss 51(2), 49(1)).
[55] Except insofar as every charity may be engaged in limited non-charitable purposes and use their resources accordingly.
[56] It is hard to conceive of a situation whereby the new organisation would be a *bona fide* purchaser of the assets without notice, and hence take free of the trust: aside from the fact that it will most likely be a volunteer; its managers / owners would clearly have notice of the trust, having been the trustees / members of the charity.
[57] This principle is not exclusive to charities. If a private trust is settled for the benefit of the members of a particular CSO, then applying the trust property for the purposes of a new organisation would be in breach of trust unless all the beneficiaries of the trust consented (see *Smith* v *Hugh Watt Society Inc* [2004] NZLR 537, especially para 62).
[58] See Luxton, above n 24 at 294. Although companies may normally alter their objects by special resolution (Companies Act 1985, s 4(1)), charitable companies also require the written permission of the Charity Commission (Charities Act 1993, s 64(2)). Luxton suggests that consent will routinely be given so long as the Commission is satisfied that the existing funds will still be applied for their original purpose (at 294). Recent Charity Commission operational guidance appears *prima facie* to contradict this, stating that the Commission will refuse consent where the change to the objects is 'so radical that it would not reasonably have been contemplated by those who have supported the company' (Charity Commission,

justification for treating a transfer to new organisation any differently. Third, if the CSO was a charitable guarantee company and decided to re-register as an unlimited private company, this would require the permission of the Charity Commission, who would again ensure that this did not prejudice existing charitable funds.[59] Finally, we can note than any attempt to evade these restrictions by dissolving the original charity is doomed: charitable trusts cannot be dissolved as such, and will continue for as long as there is trust property; the dissolution of a charitable company would simply result in the assets being applied either (i) to those charitable purposes specified in the memorandum, if any,[60] or (ii) to similar charitable purposes *cy près* by way of a scheme.

It would also be easy for an organisation to leave the public sector to join organised civil society, as this would simply require severing any links with the state – indeed, a number of independent charities have been set up by public bodies in order to carry out their statutory duties.[61] The hardest change to effect would, of course, be entry into the public sector, as, unlike the other moves, this would require a willing public body to establish a nexus with the organisation in question. It could not be effected by those with the power to amend the organisation's constitution alone.

Overlap between civil society and the public sector

It is apparent that many of the social functions described in the previous chapter are carried out not just by organised civil society but also by the state – in particular, the

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Alterations to Governing Documents: Charitable Companies: The Legal Background (OG47 A1, available at www.charity-commission.gov.uk, 2003), para 5). However, the operational guidance seems to be designed to ensure the change does not 'prejudice the original object / beneficiary class' (Charity Commission, *Alterations to Governing Documents: Charitable Companies: When is our Consent Required* (OG47 B2, available at www.charity-commission.gov.uk, 2003), para 2.2); the guidance therefore may only to relate to changes which would result in existing funds being devoted to the new objects.

[59] Companies Act 1985, s 49(5) requires that as part of the re-registration process, the company memorandum and articles have 'requisite' amendments; this would require the permission of the Commission under Charities Act 1993, s 64(2).

[60] See Luxton, above n 24 at 297, 846.

[61] See Charity Commission, *RR7: The Independence of Charities from the State* (London, Charity Commission, 2001), paras 3 - 4; on which see Garton, J., 'Charities and the State' (2000) 14 TLI 93 at 98.

state is regularly engaged in market support,[62] the provision of public goods,[63] the redistribution of wealth[64] and the facilitation of political action.[65]

Civil society and the scope of public law

As a result of the functional overlap between organised civil society and the state, a CSO may be engaged in the provision of what public law deems to be a 'public function'. It is trite to say that there is no single definition or rule for determining whether a particular function is public; rather there are a number of overlapping factors that are to be taken into account, although none is decisive. As the law stands,[66] it would seem that a CSO may be deemed to be exercising a public function if it is carrying out an activity (i) which, were it not doing so, the state would carry out itself;[67] (ii) which had previously been carried out by the state;[68] (iii) with some kind of backing or approval of the state;[69] or (iv) which is concerned with the monopolistic

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[62] E.g. the state reduces transaction costs by providing legal mechanisms such as the contract and the company. See above Ch 3 at 58 - 59.

[63] E.g. the provision of national security. See above Ch 3 at 62.

[64] E.g. the provision of social welfare such as the National Heath Service, Jobseekers' Allowance etc.

[65] Although at one level everything that relates to the state is inherently political, a more sophisticated analysis might distinguish between that which is directly political – e.g. policy-making and legislative action – and that which is only indirectly political – e.g. the employment relationship between the state and its public servants. We are concerned here with the former. A similar distinction is regularly made between the public and private actions of the state – the employment relationship noted above e.g. would be considered a private matter: see *R* v *British Broadcasting Corporation, ex parte Lavelle* [1983] 1 WLR 23, where an ex-employee of the BBC failed to secure judicial review of the decision to dismiss her as there was no public element to her relationship with her employer.

[66] The following categorisation of the law can be found in Woolf (Lord), Jowell, J., and Le Seur, A., *de Smith, Woolf and Jowell's Principles of Judicial Review* (London, Sweet and Maxwell, 1999) at 68 – 70.

[67] See e.g. *R* v *Advertising Standards Authority, ex parte Insurance Service plc* (1989) 9 Tr LR 169 and *R* v *Football Association Ltd, ex parte Football League* [1993] 2 All ER 833. In the former, it was relevant that if the ASA did not regulate advertising standards the government would; in the latter, it was relevant that if the Football Association did not regulate the football industry the government would not take over – rather, the market would step into the breach.

[68] See e.g. *Poplar Housing* v *Donoghue* [2002] QB 48; *R (Beer)* v *Hampshire Farmers' Market* [2004] 1 WLR 233 (in the context of the Human Rights Act 1998).

[69] See e.g. *R* v *Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909; *Scott* v *National Trust* [1998] 2 All ER 705 (on which see below Ch 8 n 8); *R* v *Servite Houses* (2001) 33 HLR 35; *Poplar Housing* v *Donoghue*, above n 68; *R* v *Leonard Cheshire Foundation* [2002] HRLR 30. Note also that for the purposes of the Human Rights Act 1998, the Joint Committee on Human Rights recommends that a contractual nexus between state and a CSO as service provider should be enough to class the service provider as 'public' (House of

regulation of an industry.[70] Although it would seem from the caselaw to date that, even if a CSO displayed one or more of these factors, the courts would be reluctant to find the requisite public function to enable an action for judicial review to lie,[71] it is nevertheless clear that, given the right circumstances, it is possible for a charity to be deemed to be exercising a public function.[72] There are several implications in casting certain civil society activity as public in this way. First, there are obvious practical ramifications, in that CSOs may find themselves subject to judicial review,[73] although in the case of charities the impact of this would be minimal in light of s 33 of the Charities Act 1993, which allows for proceedings to be brought in relation to a charity's administration in a similar fashion to judicial review.[74] They may also be treated as public bodies for the purposes of the Human Rights Act 1998.[75]

Second, there may be theoretical implications in extending the scope of judicial review to CSOs, particularly in relation to the provision of public goods, depending on the sociological theories of civil society to which we subscribe. It seems likely, on the basis of judicial review as it stands, that the provision of public goods could be classed as a public function. There are no published cases on this point, but one leading

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Lords and House of Commons Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Seventh Report of Session 2003 - 04* (HL Paper 39, HC 382, London, HMSO, 2004), Ch 3.

[70] This was considered a relevant, though again not determinative factor in *R* v *Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815; see too *R* v *Football Association Ltd, ex parte Football League* [1993] 2 All ER 833; *R* v *Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909. In *General Nursing Council for England and Wales* v *St Marylebone BC* [1959] AC 540, the House of Lords confirmed that an organisation which exists primarily to regulate an industry cannot be charitable (cf *Royal College of Nursing* v *St Marylebone BC* [1959] 1 WLR 1077, where the Royal College of Nursing was deemed charitable because its purpose was not the regulation of its members: the RCN's purpose is 'to promote the science and art of nursing and the better education training of nurses and their efficiency in the profession of nursing' (Registered Charity No. 276435)). However, the Charity Commission concluded in 2002 that the General Medical Council, the main function of which is the registration of medical practitioners (*Decisions of the Charity Commissioners*, 2 April 2001, para 8.3.2), was charitable by virtue of the fact that the overall purpose was 'to promote, protect and maintain the health and safety of the community by ensuring proper standards in the practice of medicine' (*ibid*, para 8.4.3).

[71] See *Poplar Housing* v *Donoghue*, above n 68; *R* v *Leonard Cheshire Foundation*, above n 69.

[72] See *Poplar Housing* v *Donoghue*, above n 68.

[73] See generally Lyon, A., 'Judicial Review of Voluntary Bodies' in Dunn, A. (ed.), *The Voluntary Sector, the State and the Law* (Oxford, Hart, 2000).

[74] For a comparative analysis of the two mechanisms see below Ch 8 generally.

[75] See *Aston Cantlow and Wilmcote with Billesley PCC* v *Wallbank* [2003] 3 WLR 283.

administrative law text states unequivocally, although without authority, that 'a body is performing a public function when it provides "public goods"'.[76] Certainly if we consider paradigm public goods such as national security or public amenities such as street lighting[77] or the transport infrastructure,[78] it is easy to conceive that civil society activity in these areas would be replaced by the state if CSOs were to withdraw their presence. In fact, this has already occurred in some cases, for example in relation to charities concerned with the maintenance of bridges: Picarda notes that today the income received by these charities 'in most cases' is simply given straight to the relevant local authority for that purpose.[79] In relation to environmental public goods, the National Trust operates within a statutory framework and thus could be said to enjoy the support of the state.[80] Civil society activities in relation to other social functions may be equally susceptible to classification as public functions for judicial review purposes. In relation to market support, it is likely that the activities of professional organisations such as the General Medical Council would be undertaken by the state if circumstances were different.[81] In relation to the redistribution of wealth, the same is true of certain activities directed towards the relief of poverty or the provision of education.[82]

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[76] Woolf *et al*, above n 66 at 65.
[77] *Attorney General* v *Brown* (1818) 1 Swan 265.
[78] *Attorney General* v *Shrewsbury Corporation* (1843) 6 Beav 220.
[79] Picarda, H., *The Law and Practice Relating to Charities* (London, Butterworths, 1999) at 140. The reason for the continued existence of such charities appears to be because of a reluctance on the part of the trustees to apply for a scheme so that the money can be utilised elsewhere (*ibid* at 141). Without such a scheme, exemption from the rule against perpetuity means that a charity with endowment funds can trundle along *ad infinitum*.
[80] National Trust Act 1971, Part II. On the law regarding the position of the National Trust with regard to judicial review, see below Ch 8 n 8.
[81] See above n 70.
[82] E.g. in the absence of CSO hospitals, hospices *et al*, the state would doubtless wish to expand NHS provision accordingly (on functional overlap in relation to healthcare, see Rothermich, P., 'Defining "Charitable" in the Context of State Property Tax Exemption for Nonprofit Nursing Homes' (1999) 34 *Saint Louis University Law Journal* 1109 at 1113). Similarly, in the absence of public schools, the state would wish to accommodate these students with the state education system. Of course, in situations such as this, whether the state would, in reality, step in were civil society provision to drop off, would be dependent on resource implications, and also on whether people would be willing to pay for the goods in private sector instead.

Weibrod's theory of market failure[83] and Levitt's theory of government failure[84] lend weight to the idea that activities of this sort may be classified as public functions. These theories suggest that the state is the appropriate provider of collective goods and that civil society organisations step in only when the government fails (inevitably) to provide collective goods at a level that satisfies the utility of all its citizens. Thus, the judicial review of CSOs which engage in the provision of collective goods would, under this analysis, seem uncontroversial: if the state is our first-choice as provider, it would seem reasonable to class the provision of collective goods as a public function. However, theoretical difficulties arise if we consider Salamon's theory of voluntary failure,[85] which regards organised civil society as the preferred provider of public goods, with the state stepping in only in those situations when organised civil society fails to carry this out satisfactorily. If we prefer this interpretation of civil society activity (and we have already noted limitations in the others),[86] then it cannot be appropriate to label the provision of collective goods as inherently 'public' in nature: in the absence of voluntary failure, the state would not be concerned with their provision at all. Considering judicial review in the light of the theory of voluntary failure throws up a number of interesting public law questions – such as the appropriateness of the existing criteria for determining public functions, the inherent limitations of the bipartite classification of society adopted by the courts in judicial review actions,[87] whether amenability to judicial review should be based solely on function or take organisational structure into account as well[88] – but an attempt to answer these would fall outside the scope of this thesis. From a regulatory perspective, it is sufficient that we are aware of the possibility that CSOs may, in the future, become routinely reviewed in this way. Should this happen, then an integrated

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[83] See above Ch 3 at 63 - 65.
[84] See above Ch 3 at 70 - 72.
[85] See above Ch 3 at 72 - 81.
[86] See above Ch 3 at 65, 71 - 72.
[87] On which see generally Freedland, M., 'Charity Law and the Public/Private Distinction' in Mitchell, C., and Moody, S., (eds.), *Foundations of Charity* (Oxford, Hart, 2000).
[88] See e.g. Oliver, D., *Common Values and the Public-Private Divide* (London, Butterworths, 1999); Oliver, D., 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] PL 476; Oliver, D., 'Functions of a Public Nature under the Human Rights Act' [2004] PL 329.

regulatory policy must take this into account in order to minimise any duplication of control.[89]

Overlap between civil society and the private sector

The functional overlap between organised civil society and the private sector can be divided in two types: (i) that which occurs when both sectors operate in the same social sphere and (ii) that which occurs when CSOs engage in trading in order to finance their social function. In relation to the first type, the market has at least some presence in most social spheres. In particular, we should note that private firms are regularly engaged in the provision of education: consider those professional colleges run on a for-profit basis,[90] the public / private partnerships (PPPs) between the state and private investors which are used to attract resources to ailing state schools,[91] and the research and development which is carried out in-house by private firms.[92] We have also already noted the functional overlap between organised civil society and the state in relation to the provision of healthcare: the private sector also has a significant presence in this sector.[93] Finally, it is important to note, particularly following the recent recognition of the charitable status of amateur sports clubs,[94] the private sector activities relating to sport and recreation.[95] Functional overlap of this kind is significant from a regulatory perspective for the reason noted above:[96] namely, the need for some consistency within a particular sphere of industry.

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[89] For a discussion of the likely impact of this on the basis of the current law, see below Ch 8 generally.

[90] E.g. BPP Professional Education Ltd, which has been listed on the Stock Exchange since 1988.

[91] As at 24 February 2004, there were 40 PPPs in operation (including 14 at further education level and 12 at higher education level (see www.dfes.gov.uk/ ppppfi/projects/proj2.shtml and www.dfes.gov.uk/ppppfi/projects/proj3.shtml)) with another 26 signed agreements at the planning stage and a further 36 agreement at procurement stage: see Department for Education and Skills, *Public Private Partnership (PPP) Projects in Schools Project List* (DFES, London, 2004). The first of these ventures, the Sir John Colfox School, Dorset, opened in September 1999.

[92] This overlaps with similar research and development undertaken in CSOs such as universities (see above Ch 3 at 60 - 61).

[93] See above n 14 and associated text; Rothermich, above n 82 at 1113.

[94] See below at 194.

[95] Consider e.g. health clubs and corporate gyms.

[96] See above at 146.

In relation to trading activities by CSOs, the main regulatory concern is whether any regulation aimed at fostering civil society activity might have the effect of giving CSOs an unfair advantage over private sector firms operating in the same market. It is for this reason that the Labour government has refused to implement the Strategy Unit recommendation that charities be permitted to carry on all their trading activities themselves.[97] Under the current law, it has been held that:[98]

> ... merely to set out to raise money, to run a business or to buy and sell property, for example, stocks and shares, in order to make money, albeit with the motive of paying that money over so that it will be used for charitable purposes, is not ... charitable ... It is ... a purpose or purposes of which the motive is to make the outcome of the activities available to those who will apply that outcome for charitable purposes. It is a separate and earlier step leading to an increase in the assets of those who carry out the charitable purposes.

Accordingly, if a charity wishes to engage in trading other than that which is (i) an inherent part of its charitable purpose,[99] or (ii) ancillary to and in furtherance of its charitable purpose,[100] it must do so through a subsidiary for-profit organisation which transfers any surplus back to the parent charity.

Overlap between civil society and the informal sector

There is a degree of functional overlap between CSOs and the informal sector: redistribution of wealth and the provision of mutual support are commonly carried out within the family unit or tribe. This is unsurprising, as we have already noted that organised civil society may have developed out of extended familial support networks.[101] From a regulatory perspective, this is significant because insufficiently

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[97] See below n 279.
[98] *Aldous* v *Southwark Corp* [1968] 1 WLR 1671 at 1682 *per* Winn LJ; this case was doubted by the majority of the House of Lords in *Oxfam* v *Birmingham City District Council* [1976] AC 126, but not on this general point.
[99] Charity Commission, *CC35: Charities and Trading* (London, Charity Commission, 2001) para 6.
[100] Charity Commission, above n 99 paras 13 – 14. On the kinds of trading likely to fall into this category, see Luxton, above n 24 at 730.
[101] See above Ch 2 at 40.

tight regulation[102] risks the 'juridification' of the informal sector, by which we mean replacing the organic, informal structures which naturally govern the sector's operation with a formalistic legal equivalent,[103] which, at an extreme level, may have the effect that

> human conflicts are torn … out of their living context and distorted by being subject to the legal process.[104]

As we have already noted,[105] this is a problem to which organised civil society itself is also susceptible: the nature of 'resources such as personal effort, commitment and flexibility of interaction' which characterise the sector[106] being such that they 'cannot … be centrally monitored for errors'.[107]

(3) Micro level interaction between sectors

Consider the government department, the bookshop and the reading group that we held up as sector paradigms at the beginning of this chapter. Would we still be confident in classifying them as falling, respectively, in the public sector, private sector and organised civil society if, for example, we learned that the bookshop, although operating in the same market as other bookshops, was in fact owned by the reading group and run solely to fund its activities?[108] How would we deal with another reading group which operated on exactly the same basis but was established under the aegis of the government department, say as part of a national literacy campaign?[109] There is no easy solution to situations such as these. If the bookshop was operated on a for-profit basis then there is a case for treating it as belonging in the private sector. However, if all profits go to the reading group, as the owner, and the bookshop exists solely to

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[102] See above at 155 - 158.
[103] Teubner, G., 'Juridification: Concepts, Aspects, Limits, Solutions' in Baldwin, R., Scott, C., and Hood, C. (eds.), *A Reader on Regulation* (Oxford, OUP, 1998).
[104] Teubner, above n 103 at 393.
[105] See above Ch 4 at 150.
[106] See above Ch 3 at 105 - 111.
[107] Zacher, H., 'Juridification in the Field of Social Law' in Teubner, G. (ed.), *Juridification of the Social Spheres* (Berlin, Walter de Gruyter, 1987) at 389.
[108] On links between CSOs and the private sector, see generally Abzug, R., and Webb, N., 'Relationships Between Nonprofit and For-Profit Organizations: A Stakeholder Perspective' (1999) 28 *Nonprofit and Voluntary Sector Quarterly* 416.

resource a parent organisation which satisfies our structural and functional definition of a CSO, then there is clearly a case for saying the bookshop more properly belongs in organised civil society. Likewise, as the second reading group is owned and operated by a government department there is case for saying it too falls in the public sector. However, it would seem to satisfy the functional definition of organised civil society – its function being the facilitation of self-determination through ideological expression – and if it exhibits the shared characteristics (other than independence) we identified in Chapter Two then there is a case for saying it should stand alongside the other reading group in organised civil society.[110]

Implications for regulation

As well as having implications for the scope of regulation,[111] these kinds of cross-sector interactions may result in the structural differences between organised civil society and the other sectors breaking down over time, by way of what Langton terms trait absorption.[112] Problems of this nature may also arise where organisations interact with existing organisations (as opposed to creating their own subsidiary as in the examples above) across the sector boundaries, even if those organisations are, when examined in isolation, paradigms of their respective sectors. An obvious example of this kind of interaction between the sector and the state is the contract culture,[113] which we will discuss in detail later;[114] there are also instances where CSOs actually engage

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[109] On the charity law implications of a move such as this, see Garton, above n 61 at 97; also generally Charity Commission, above n 61.

[110] On hybridisation generally, see Langton, S., 'Envoi: Developing Nonprofit Theory' in Ostrander, S., and Langton, S., *Shifting the Debate: Public / Private Sector Relations in the Modern Welfare State* (New Brunswick, Transaction, 1987) at 143 - 144.

[111] See above at 155 - 158.

[112] Langton, above n 110 at 144.

[113] The contract culture emerged during the 1980 and 90s (see Kendall, J. and Knapp, M., *The Voluntary Sector in the UK* (Manchester, Manchester University Press, 1996) at 228) but, on an individual level, there is a long tradition of conditional funding by the state – in his history of English philanthropy, Owen mentions such a grant received by the Foundling Hospital in 1756, which Morris notes as an early example of contracting (Owen, D., *English Philanthropy 1660 – 1960* (Cambridge, Massachusetts, Harvard University Press, 1965) at 52 – 57; Morris, D., 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities' in Dunn, above n 73 at 125).

[114] See below Ch 6 at 240 - 243.

the state as service provider, particularly in relation to public amenities.[115] So far as the relationship between organised civil society and the market is concerned, O'Regan and Oster suggest a number of reasons why CSOs may wish to subcontract certain activities to private firms: (i) to raise capital, (ii) motivate staff, and (iii) for 'ease of action', avoiding the 'checks and balances' of any applicable CSO regulatory regime.[116] Particularly important is the contracting out of fundraising to the private sector,[117] which has been the subject of specific government scrutiny.[118] Firms, meanwhile, engage CSOs in activities which tend towards the welfare of their own staff, such as child care.[119] Over time, such interaction can tend towards organisations from one sector adopting characteristics of another – evidenced by the trend towards professionalization across organised civil society.[120] At an extreme level, this can lead to the creation of hybrid organisations, such as the social enterprise in the UK, which operate half way between organised civil society and the private sector.[121] This is particularly significant from a regulatory perspective, as we must be careful to ensure that the transfer of traits from other sectors to organised civil society does not (i) alter the quiddity of the sector such that CSOs lose the characteristics which make them suited to their particular social functions, or (ii) bring with it other weaknesses that may encumber the operation of the sector.

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[115] See Young, D., 'Alternative Models of Government-Nonprofit Sector Relations: Theoretical and International Perspectives' (2000) 29 *Nonprofit and Voluntary Sector Quarterly* 149, who cites the example of United States CSOs paying for the government to erect public monuments (at 155); also above n 79 and associated text.

[116] O'Regan, K., and Oster, S., 'Nonprofit and For-Profit Partnerships: Rationale and Challenges of Cross-Sector Contracting' (2000) 29 (Supplement) *Nonprofit and Voluntary Sector Quarterly* 120 at 123.

[117] Morris, D., 'The Media and the Message: An Evaluation of Advertising by Charities and an Examination of the Regulatory Frameworks (1995 / 96) 3 CLPR 157 at 158.

[118] Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (London, HMSO, 2002), para 6.33.

[119] Boris, E., 'Nonprofit Organisations in a Democracy: Varied Roles and Responsibilities' in Boris, E. and Steuerle, E. (eds.), *Nonprofits and Government Collaboration and Conflict* (Washington, DC, Urban Institute Press, 1999) at 21.

[120] Langton, above n 110 at 144. Although this characteristic is commonly associated with the private sector, it is also encouraged by increased links with the public sector who are used to contracting out to the private sector and encourage CSOs to act in a similarly professional fashion. See Garton, above n 61 at 96 – 97.

[121] See below at 187 - 189.

(4) Macro level interaction between sectors

Finally, any regulatory strategy must also be aware of the way in which the sectors as a whole affect each other, as trends in one may have an unanticipated impact on the others.[122] Young suggests that the relationship between organised civil society and the state can be characterised as being 'supplementary', 'complementary' or 'adversarial' (or a combination of all three).[123] The predominant type of relationship in any given social sphere will be determined partly by the nature of the social function pursued and partly by the way in which CSOs conceptualise their own role in society.

Supplementary relationship

Young notes that, in the context of public goods provision, CSOs may consider that their function is to augment the services provided by the state – to step in when state output drops below what it considers to be the optimum level.[124] Much CSO provision of public goods is either explicitly or implicitly consistent with this relationship. For example, in the context of national security, the purpose of the Nuffield Trust for the Forces of the Crown is:[125]

> promoting the welfare and efficiency of the forces of the crown either by the provision of facilities for recreation or by any other means

but it is the trustees' explicit policy only to provide those facilities 'which are not provided by public funds'.[126] The same is also true of many organisations that facilitate the redistribution of wealth. For example, many charities that relieve poverty, such as Oxfam and Shelter,[127] are in the business of helping those to whom the resources of the state do not extend. So far as implicit consistency goes, we can consider the significant number of environmental organisations that undertake

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[122] See Langton n 110 at 144; also generally Saidel, J., 'Dimensions of Interdependence: The State and Voluntary-Sector Relationship' (1989) 18(4) *Nonprofit and Voluntary Sector Quarterly* 335 especially at 337.
[123] See generally Young, above n 115.
[124] Young, above n 115; see also Langton, S., 'The New Volunteerism' (1981) 10 Journal of Voluntary Action Research 7 at 10.
[125] Registered Charity 210829.
[126] See the trust's website (www.nuffieldtrust.org).
[127] Charity Numbers 202918 and 263710 respectively.

conservation activity, as opposed to environmental research – for example, projects undertaken by Friends of the Earth Trust Ltd in pursuit of its second stated purpose:

> 'the conservation, protection and restoration for the public benefit of the natural resources, natural beauty and animal and plant life of the world'[128]

can be viewed as a response to the fact that the state has insufficient available resources to tackle every environmental problem.[129] A supplementary relationship between the sector and the state is consistent with the theory of market failure[130] and with the theory of government failure.[131] However, it is clearly inconsistent with the theory of voluntary failure, as this understands state provision to be supplementary to civil society activity, not the reverse.[132]

Complementary relationship

Alternatively, Young suggests CSOs may consider that their role is to complement the services already provided by the state[133] – in other words, to act primarily as alternative service providers to give consumers greater choice.[134] This would appear to be evidenced in relation to those CSOs which enter into service contracts with the state.[135] In contrast to the supplementary relationship described above, this relationship is consistent with the theory of voluntary failure,[136] but inconsistent with the theory of government failure.[137]

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[128] Charity Number 281681

[129] On these organisations generally, see Charity Commission, *RR9: Preservation and Conservation* (London, Charity Commission, 2001).

[130] Young, above n 115 at 151; see above Ch 3 at 63 - 65.

[131] See above Ch 3 at 70 - 72.

[132] See above Ch 3 at 72 - 79.

[133] Young, above n 115 at 153 - 155.

[134] Noted by Home Office, *Getting it Right Together: Compact on Relations between Government and the Voluntary and Community Sector in England* (London, HMSO, Cm 4100, 1998), para 8.2; see also, Douglas, J., *Why Charity? The Case for a Third Sector* (Beverley Hills and London, Sage, 1983) at 13; James, above n 138 at 22.

[135] Salamon and Anheier suggest that when this relationship is in place, if the state increases spending then state funding will constitute a greater proportion of CSO income than otherwise (Salamon, L. and Anheier, H., 'Social Origins of Civil Society: Explaining the Nonprofit Sector Cross-Nationally' (1998) 9 *Voluntas* 213 at 226).

[136] Young, above n 115 at 153. The 'contract culture' can be viewed as the government responding to voluntary failure on the grounds of insufficiency of resources (see above Ch 3 at 79 - 80).

[137] See above Ch 3 n 85 and associated text.

Adversarial relationship

A third type of relationship may arise in relation to the facilitation of political action: where this function is concerned, the relationship between organised civil society and the state will frequently be adversarial in nature.[138] Typically, this will happen when (i) a CSO campaigns in order to effect a change in government policy so as to persuade the administration to fund a particular social cause in a manner which suits its members or (ii) a CSO uses its expertise to highlight the defects in a particular government initiative.[139] When this occurs, there will be a natural temptation for the state to try either to prevent CSOs from campaigning altogether, or to minimise the effectiveness of their campaigns, and this may impact upon any regulatory strategy. In its Compact with the sector, the Labour government made a commitment to respect the political role of CSOs even when they are critical of government.[140] However, we have already noted[141] that so far as the charitable sector is concerned, significant restrictions are placed on campaigning by both rules of charity law[142] and Charity Commission guidelines.[143] Current reform proposals do not recommend any substantive changes in this area.[144]

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[138] Young, above n 115 at 151. Note that there may be elements of an adversarial relationship between organised civil society and the state outside the area of political action: James notes that where CSOs operate as alternative service providers they may find themselves competing with the government for service users (James, E., 'Economic Theories of the Nonprofit Sector: A Comparative Perspective' in Anheier, H. and Seibel, W. (eds.), *The Third Sector: Comparative Studies of Nonprofit Organisations* (Berlin and New York, Walter de Gruyter, 1990) at 22). Note also that political action by organised civil society will not necessarily be adversarial – a CSO may campaign in order to alert the government and the public to a particular social problem in relation to which there is no established government policy, or may use its expertise to comment favourably on a particular government initiative.

[139] Although in the short-term the administration may look upon this unfavourably as generating negative publicity, one would hope that where criticism is justified and constructive this would lead to improved performance in the long-term (see Clark, J., 'The State, Popular Participation and the Voluntary Sector' in Hulme, D., and Edwards, M. (eds.), *NGOs, States and Donors: Too Close for Comfort* (Basingstoke and London, MacMillan, 1997) at 55).

[140] Home Office, above n 134, para 9.1.

[141] See above Ch 2 at 44; also below at 196 - 200.

[142] See e.g. *National Anti-Vivisection Society* v *Inland Revenue Commissioners* [1848] AC 31 at 61 *per* Lord Simonds; at 77 *per* Lord Normand; noted in *McGovern* v *Attorney General* [1982] Ch 321 at 341 *per* Slade J.

[143] Charity Commission, *CC9: Political Activities and Campaigning by Charities* (London, Charity Commission, 2004) especially paras 23 - 24.

[144] See below n 231.

Protean nature of boundary

Where both sectors have a presence in a particular sphere, it would seem likely that the operation of one may have some impact on the actions of the other. Young suggests that the topography of organised civil society will be determined in part by the way in which its participants conceptualise their relationship with the state.[145] The same is also likely to be true in relation to the way that the relevant state organs conceptualise the relationship. If the collective attitude of CSOs in a particular sphere is that they are supplementary to the state then, in theory, if the state were to decrease its activities, civil society presence would grow. Similarly, if the state were to increase its activities, civil society activity would decrease proportionately – the sector will either shrink in size[146] or devote fewer resources to the relevant activities.[147] Conversely, if CSOs view their role as complementary to the state, we would expect the opposite reaction to shifting levels of state activity:[148] CSO activity should increase when state activity increases and vice versa.[149]

Social origins theory of civil society / state relations

The extent to which these ideas are borne out in reality is unclear. Young suggests it is possible to map a history of organised civil society from the eighteenth century to the twentieth century which shows how shifting attitudes towards the role of the sector have shaped its activity,[150] but empirical research conducted in the 1990s by the Johns Hopkins Comparative Nonprofit Sector Project to test whether the size of organised civil society shifts according to government spending suggests other social factors are at play, as[151]

> the nonprofit sector [is] not an isolated phenomenon floating freely in social space but … an integral part of a social system whose role and scale are a by product of a complex set of historical forces.

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[145] See generally Young, above n 115.
[146] Salamon and Anheier, above n 135 at 221.
[147] Young, above n 115 at 150.
[148] *Ibid.*
[149] *Ibid*; also Salamon and Anheier, above n 135 at 225.
[150] Young, above n 115 at 159.
[151] See generally Salamon and Anheier, above n 135.

Salamon and Anheier argue that the relationship between organised civil society and the state is better explained by the relationship between the different classes of citizens in a given jurisdiction. Specifically, on the basis of the Johns Hopkins project, it seems that, at least in the context of social welfare provision, the following is likely: (i) a dominant middle class encourages minimal state activity and extensive civil society activity, with the latter being largely reliant on private donations rather than state service contracts; (ii) a dominant working class encourages extensive state activity and minimal civil society activity, with the latter again being dependent largely on private donations; (iii) a strong landed class encourages both extensive state and civil society activity, with the latter largely reliant on state funding; and finally (iv) where the state 'exercises power on its own behalf, or on behalf of business', both state and civil society activity will be minimal, the latter now being funded primarily by service charges.[152]

Impact on regulation

These theories may have an impact on the success of any given regulatory strategy. If regulation designed to encourage sector growth[153] ran alongside increased state provision in a sphere where the prevailing attitude is that organised civil society provision is supplementary to state provision, then the sector would be pulled in opposite directions. The same would be true if a similar regulatory strategy were pursued in order to compensate for reduced state presence in a sphere where the prevailing attitude is that organised civil society provision is complementary to state provision. Similarly, in relation to social origins theory, regulation designed to nurture CSOs may struggle to overcome social forces in societies with a dominant working class or an autonomous state.[154] However, it is likely that in practice the sector's heterogeneity will mean that no one theory will enable us to predict accurately how the relationship between the state and organised civil society will affect the operation of the latter. Certainly, Young suggests that supplementary and complementary

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[152] Salamon and Anheier, above n 135 at 230 - 231.
[153] See above Ch 4 at 148 - 149.
[154] See the previous paragraph.

relationships are often 'manifested simultaneously',[155] even in relation to a particular social sphere. It is also likely that the sector will be affected by the size and shape of the private sector – where the private sector is seen to be trustworthy, there may be less call for CSO activity in spheres where their presence is predicated on their trustworthiness.

C. RELATIONSHIP BETWEEN CIVIL SOCIETY AND THE CHARITABLE SECTOR

Having considered the nature of the relationship between organised civil society and the public and private sectors, it is prudent at this point to consider in detail the relationship between the charitable sector and wider organised civil society.[156] When considering how best to define organised civil society, we chose to leave the legal definition of charity to one side on the ground that, as it predates the sociological theories of civil society which formed the basis of our definition, it may prove an inappropriate basis for regulation. We are now in a position to consider whether this is in fact the case. Accordingly, the following analysis examines the topography of the charitable sector, as currently defined in England, in relation to wider organised civil society in order to determine (i) the extent to which the sector is congruent with organised civil society as a whole and (ii) whether the reasons for any incongruity are sufficient to justify focusing regulation on charities. This is an important task: the current system of regulation in England takes the charitable sector as its focus, and the current reforms in Canada, England, New Zealand and Scotland continue to focus regulatory attention on the charitable sector, albeit in some cases an enlarged one.[157] It is argued that there are no functional distinctions between the charitable sector and the rest of organised civil society, but that the range of purposes traditionally considered charitable fails to reflect this. The Charity Commission's review of the register and

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[155] Young, D., 'Complementary, Supplementary, or Adversarial? A Theoretical Examination of Nonprofit-Government Relations in the United States' in Boris and Steuerle, above n 119 at 32.

[156] It is important to note that, whilst the following discussion takes the charitable sector in England and Wales as its focus, the concept of charity, and organised civil society more generally, also have relevance in (i) other common law jurisdictions and (ii) civil law and mixed law systems (for an overview of this see, see generally 6, P., and Randon, A., *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Aldershot, Dartmouth, 1995), Chs 2 - 3). On the decision to focus generally on common law jurisdictions and, more specifically, on the English law, see the research methodology, above Ch 1 at 31, 34.

the draft Charities Bill go some way towards rectifying this disparity – in particular by explicitly recognising the charitable status of the promotion of human rights and amateur sports clubs – but two key features continue to separate charities from the wider sector: the rule against political purposes and the public benefit requirement. The second of these is related to the one structural distinction separating charities and some (but not all) non-charitable CSOs – non profit distribution. It is argued that whilst it may be proper that the presence or absence of profit or non-fiscal private benefit should influence regulatory strategy, it is inappropriate to define the limits of regulation on this basis.

(1) Structural comparison

We concluded in Chapter Two that there are four characteristics which structurally define CSOs: (i) independence, (ii) organisation, (iii) non profit distribution and (iv) volunteerism. All charities are required by law to exhibit the first three characteristics. Technically, not every charity has to operate on a voluntary basis, although it is probable that in practice most will be able to demonstrate a 'reasonable showing' of this fourth characteristic.[158]

Independence

Organisations which fall inside organised civil society should in theory be independent from control by other sectors. In relation to charities, this is provided for by the fiduciary nature of charitable trusteeship and directorship, which demands that all decisions taken at trustee level are made solely in the interests of the charity itself.[159] In this respect, charity law goes beyond the requirements of civil society theory, as every charity is independent not only from public sector organisations, private sector firms and the private interests of the trustees, but also from other CSOs and charities. Despite this theoretical requirement, those charities that interact with organisations

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[157] See above Ch 1 at 19 - 26.
[158] Salamon, L. and Anheier, H. (eds), *Defining the nonprofit sector: A cross-national analysis* (Manchester and New York, Manchester University Press, 1997) at 34.
[159] *Bray v Ford* [1896] AC 44.

from other sectors are, in practice, inevitably susceptible to challenges to their independence along the lines discussed above.[160]

Organisation

Charity law also obliges us to use a formal legal structure when establishing a charity. Thus charities satisfy the requirement that CSOs be organised (and thus distinct from the informal sector). This is well illustrated by the case of *Down* v *Worrall*,[161] which concerned a bequest to trustees to apply the testator's residuary estate:[162]

> either to or for charitable or pious purposes, at their discretion, or otherwise for the separate benefit of my sister … and all or any of her children.

When the sole surviving trustee died, £500 of the residuary estate remained. The High Court held that the bequest did not invoke the jurisdiction of charity law, which would have allowed the court to carry out the bequest on the ground that a charitable trust will not fail for want of a trustee,[163] because 'here no disposition is made in favour of charity';[164] rather, the trustees merely 'had a personal discretion as to the application of the fund'.[165] In order to make such a disposition, it is necessary to separate the fund from the assets of both the founder and the trustees, which necessitates the use of one of three basic legal structures:[166] (i) the trust; (ii) the unincorporated association; and (iii) the company.[167] It is clear that each of these structures is appropriately

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[160] On which, see generally: Charity Commission, *CC29: Charities and Local Authorities* (London, Charity Commission, 2001); Charity Commission, *CC35: Charities and Trading* (London, Charity Commission, 2001); Charity Commission, *CC37: Charities and Contracts* (London, Charity Commission, 2003). See also above at 169 - 171.

[161] (1833) 1 My & K 561

[162] Above n 161 at 561.

[163] See e.g. *Moggridge* v *Thackwell* (1803) 7 Ves 36. The exception to this is where the trust is predicated on a specific person taking up trusteeship: *Re Lysaght* [1966] Ch 191 at 204 - 205 *per* Buckley J. For this, the settlor must clearly do more than merely identify his trustees.

[164] Above n 161 at 563 *per* Sir John Leach MR.

[165] Above n 161 at 563 – 564 *per* Sir John Leach MR.

[166] Attempts to use other legal structures, such as the contract or the covenant, will fail (unless used in conjunction with one of the three structures: see *Liverpool City Council* v *Attorney General* The Times 1 May 1992 (on the contract) and *Attorney General* v *Barratt Manchester Ltd* The Times 11 July 1991 (on the covenant). See generally, Luxton, above n 24 at 253 – 254.

[167] Although there are other legal structures available to charities, namely the friendly society and the industrial and provident society, these are simply variant forms of either the unincorporated association or the company: friendly societies may take either form (Friendly

'organised': the company has its own legal personality independent from its members, and, whilst this privilege is not accorded either to the trust or to the unincorporated association, the assets of both are treated as segregated from those of the trustees and members.

Non profit distribution

Charities are required to operate on a non profit distributing basis.[168] They are not required to operate at a loss,[169] but any profit made must be used for exclusively charitable purposes as opposed to distributed amongst the organisation's members.[170] However, although charities demonstrate this structural characteristic, a number of CSOs – such as certain mutuals and social enterprises – do not. We shall return to this issue below.[171]

Volunteerism

The only structural characteristic which is not demanded of charities by law is volunteerism, which we defined in Chapter Two as meaning that a CSO is (i) either managed by volunteers, (ii) staffed by volunteers or (iii) funded by voluntary contributions.[172] Although it has been said that 'the essence of charitable service in the capacity of a trustee is to act without gratuity',[173] it is clear from the caselaw that it is perfectly acceptable for the trustees of a charity to be remunerated for their work where the charity's governing document expressly authorises this.[174] It is also clear

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Societies Act 1992, ss 5 & 6); industrial and provident societies take the form of the latter (Industrial and Provident Societies Act 1965, s 3). The Charities Bill 2004 provides for a new organisation, the Charitable Incorporated Organisation (see s 32 and Sched. 6); again, as its name suggests, this will simply be another variation on the company.

[168] *Re Smith's Will Trusts* [1962] 1 WLR 763.

[169] *Re Resch's Will Trusts* [1969] 1 AC 514.

[170] *Incorporated Council of Law Reporting for England and Wales* v *Attorney General* [1971] Ch 626.

[171] See below at 202 - 204.

[172] See above Ch 2 at 49 - 50.

[173] Lord Philips of Sudbury, *Hansard Lords Debates*, 14 April 2000, column 387. This comment was made during the second reading of the Trustee Act 2000, which empowers the Secretary of State to provide for the remuneration of professional charity trustees (s 30(1)).

[174] See e.g. *Willis* v *Kibble* (1839) 1 Beav 559.

that it is acceptable for a charity to employ workers;[175] indeed, this will often be necessary where particular skills are required.[176] Finally, it is clear that charities may rely on resources other than donations – for example, by carrying on a trade[177] or entering into a contract for service provision.[178]

Prima facie, it may seem that this is the point where structural differences between charities and wider organised civil society appear. However, there are two important things we must note. First, the need to employ professional managers and workers in certain circumstances – in order to secure particular skills or attract participants of an appropriate calibre – is not exclusive to charities but can affect organisations across the whole of organised civil society, and the same is true of the need to look beyond donations for funding. Second, although the law does not demand that trustees are unpaid in all circumstances, this is discouraged. Where a charity's governing document does not expressly permit the remuneration of its trustees, remuneration can only take place with the approval of the Charity Commission or the court.[179] The Commission's stance is that the 'concept of unpaid trusteeship has been one of the defining characteristics of the charitable sector',[180] and, for that reason, it will only approve a scheme to amend the governing document if the trustees demonstrate that they are unable to find appropriately qualified volunteers to carry out the task for which remuneration is requested.[181] It also seems that even where the Commission is prepared to take action, it will not do so if this would mean that all the trustees of the charity in question would be remunerated. This effectively means that the only charities that might find themselves unable to demonstrate at least some level of volunteerism are those whose founders had the prescience to expressly permit the remuneration of all their trustees.

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[175] See generally Burrows, E., *Employment Law for Charities: A Practical Guide* (London, Jordans, 2003). Note that it may be necessary to amend a charity's governing document in order that the trustees have the power to do this.
[176] Warburton, J. and Morris, D., 'Charities and the Contract Culture' [1998] Conv 419 at 426.
[177] See above at 168.
[178] See above Ch 2 n 73 and associated text.
[179] By way of a scheme: see Charities Act 1993, ss 16 and 17.
[180] Charity Commission, above n 180, para 6.
181 Charity Commission, *CC11: Payment of Charity Trustees* (London, Charity Commission, 2004), Annex, under 'Additional factors to consider when paying a trustee for being a trustee'.

(2) Functional comparison

Pre-reform position[182]

Before the current reforms, there were three discrete charitable purposes that emerged from the caselaw: (i) the relief of poverty, (ii) the advancement of education and (iii) the advancement of religion.[183] To these we can add those other purposes which are beneficial to the community and are analogous to the purposes listed in the Preamble to the Statute of Charitable Uses 1601, which hence fall into the fourth head of charity. Although there are no formal subcategories of the purposes which the courts have upheld as charitable under this head, it is useful to adopt the following groupings, some of which are used by the Charities Bill 2004 (all but two of the new heads of charity proposed under the Bill are already charitable under the current law) and the rest of which can be found in the three leading monographs:[184] (iv) the advancement of health or the saving of lives;[185] (v) the advancement of citizenship or community development;[186] (vi) the advancement of the arts, culture, heritage or science;[187] (vii) the advancement of environmental protection or improvement;[188] (viii) the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;[189] (ix) the advancement of animal welfare;[190] (x) the promotion of public works and amenities;[191] (xi) the relief of rates and taxes;[192] (xii) the protection of human life and property;[193] (xiii) national security and the preservation of public order;[194] (xiv) the promotion of agriculture, industry and commerce;[195] (xv) the benefit

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[182] For the purposes of the following analysis, the pre-reform position refers to the law as it stood before the start of the Charity Commission's review of the register in 1998.
[183] *Pemsel*, above n 4 at 583 *per* Lord Macnaghten.
[184] These being Luxton, above n 24; Warburton, J., *Tudor on Charities* (London, Sweet and Maxwell, 1995); Picarda, H., *The Law and Practice Relating to Charities* (London, Butterworths, 1999).
[185] Charities Bill 2004, s 2(2)(d).
[186] Charities Bill 2004, s 2(2)(e).
[187] Charities Bill 2004, s 2(2)(f).
[188] Charities Bill 2004, s 2(2)(i).
[189] Charities Bill 2004, s 2(2)(j).
[190] Charities Bill 2004, s 2(2)(k).
[191] Luxton, above n 24 at 144; Picarda, above n 184 at 140, 142; Warburton, above n 184 at 91.
[192] Luxton, above n 24 at 145; Picarda, above n 184 at 144; Warburton, above n 184 at 103.
[193] Luxton, above n 24 at 146; Picarda, above n 184 at 152; Warburton, above n 184 at 93.
[194] Luxton, above n 24 at 147; Picarda, above n 184 at 147; Warburton, above n 184 at 96.
[195] Luxton, above n 24 at 150; Picarda, above n 184 at 161; Warburton, above n 184 at 103.

of a locality;[196] (xvi) the advancement of moral or spiritual welfare;[197] (xvii) resettlement and rehabilitation;[198] (xxviii) the welfare of children;[199] and (xix) the relief of prisoners.[200] Finally, we can add the statutory purpose made charitable by virtue of the Recreational Charities Act 1958: (xx) the provision of recreational facilities in the interests of social welfare.[201]

Although these twenty purposes have in common the fact that they have each been deemed worthy of charitable status by either parliament, the courts or the Charity Commission, they do not constitute a cohesive subset of organised civil society. If we consider each purpose in the context of our functional map of the sector, we can see that they are distributed broadly across all eight social functions.

Market support

Four charitable purposes are concerned in whole or in part with supporting the private market: (i) the advancement of education; (ii) the advancement of citizenship or community development; (iii) the advancement of science; and (iv) the promotion of agriculture, industry and commerce. We have already noted the ways in which the first three purposes achieve this. First, charities which advance education, citizenship or community development can assist in the reduction of transaction costs by encouraging citizens to adhere to the legal rules which govern commercial transactions, such as the law of contract;[202] they may also affect the market by the shaping of consumer preferences.[203] Second, certain charities which advance education are concerned with resolving the information asymmetry which can result in market failure, by disseminating information about private sector products and services in order that consumers can make more rational choices.[204] Finally, those charities

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[196] Luxton, above n 24 at 155; Picarda, above n 184 at 145; Warburton, above n 184 at 105.
[197] Luxton, above n 24 at 159; Picarda, above n 184 at 163; Warburton, above n 184 at 115
[198] Picarda, above n 184 at 154; Warburton, above n 184 at 97.
[199] Luxton, above n 24 at 140; Warburton, above n 184 at 98.
[200] Luxton, above n 24 at 141; Warburton, above n 184 at 109.
[201] Recreational Charities Act 1958, s 1(1). Note that whilst recreational and sporting facilities are not charitable *per se* they may also be charitable if they are the means of promoting a valid charitable purpose – for example, education (see *Inland Revenue Commissioners* v *McMullen* [1981] AC 1).
[202] See above Ch 3 at 58 - 59.
[203] See above Ch 3 at 61.
[204] See above Ch 3 at 59 - 60.

which advance education and science supply the private sector with technological and human resources.[205]

The most significant purpose, however, is the promotion of agriculture, industry and commerce, as it would seem that this is synonymous with the provision of market support. All of the systemic and environmental activities functions we considered in Chapter Three, namely the redistribution of property rights, the reduction of transaction costs, the resolution of information deficits, the provision of resources and the shaping of consumer preferences, would therefore appear to fall within the scope of this purpose so long as they are carried out so as to benefit the public and the intention is not 'the furtherance of the interests of individuals engaging in trade or industry or commerce'.[206] However, the provision of support networks for those who participate in the market – for example, trade unions and some professional bodies[207] – are considered to fall foul of this rule, which prevents synonymity between the charitable sector and organised civil society in relation to this first social function.

Provision of public goods

Six charitable purposes may be regarded as promoting the provision of public goods.[208] We considered earlier that two paradigm public goods are national security and environmental protection. Therefore (i) the advancement of environmental protection or improvement and (ii) national security and the preservation of public order must fall into this category. No other charitable purposes necessarily result in the provision of public goods, but four have the potential to do this depending upon the

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[205] See above Ch 3 at 60 - 61.

[206] *In Re Town and Country Planning Act 1947* [1951] Ch 132 at 141 *per* Danckwerts J. This public benefit requirement is not required in relation to the promotion of agriculture, which is deemed to satisfy public benefit *per se*: *Commissioners of Inland Revenue* v *Yorkshire Agricultural Society* [1928] 1 KB 611. See Luxton, above n 24 at 150.

[207] Some professional bodies may be eligible for charitable status if they can demonstrate sufficient public interest in their activities: e.g. the General Medical Council (*Decisions of the Charity Commissioners*, 2 April 2001, reversing the decision of the Court of Appeal in *General Medical Council* v *Inland Revenue Commissioners* [1928] All ER 252 (which was affirmed by the House of Lords in *General Nursing Council* v *St Marylebone Borough Council* [1959] AC 540).

[208] The following analysis includes only those charitable purposes whose purpose is to provide a direct public good. It excludes those purposes which have been held to provide an indirect public benefit to society as a whole, such as the advancement of animal welfare, for the reasons discussed above in Ch 3 at 82 - 85.

activities which are carried out pursuant to them. Thus, (iii) the protection of human life and property may be a public good when it operates a nonrivalous and nonexcludable way. For example, the repair of sea walls, listed as charitable in the Preamble to the Statute of Charitable Uses 1601, appears to be the basis of this charitable purpose:[209] the cost of repairing such a wall remains constant regardless of the number of people who benefit, whilst the benefit of flood prevention cannot be excluded from those who choose not to contribute.[210] Likewise, (iv) the fact that the provision of policemen and a courthouse have been held to be charitable means that the promotion of public works and amenities may be carried out by the provision of public goods.[211] Also, (v) the relief of rates may be a public good where this is not limited to a particular class of beneficiary, such as a gift to the coffers of the state in order that less revenue need be generated by taxation. Finally, (vi) purposes which benefit a locality may be conveniently dealt with here. Although these are not inherently nonrivalous, they are, for all practical purposes,[212] nonexcludable. However, it may be those local purposes which are also nonrivalous would be better classified elsewhere: for example, under the promotion of public works or relief of rates.[213]

It might be thought that, because no-one can be excluded from the benefit of public goods, all public goods will provide a sufficient public benefit to be charitable. However, certain public goods probably fall outside the scope of charity. For example, a firework display, which is a pure public good, would appear not to be charitable *per se*.[214] A less frivolous example of a non-charitable public good is the promotion of fundamental human rights. The recognition of the existence of human rights by a

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[209] Luxton, above n 24 at 146.

[210] However, not all forms of such protection could be classed as public goods provision. Luxton notes the activities of Disaster Action, a charity concerned with both the prevention of disasters and the relief of those who suffer as a result of them (above n 24 at 146): the former purpose may be a public good but the latter is unlikely to be either nonrivalous or nonexcludable. Instead, this should more appropriately be seen as wealth redistribution (on which, see below at 187- 188).

[211] *Attorney General* v *Heelis* (1824) 2 Sim & St 67.

[212] Technically it may be possible to exclude beneficiaries by restricting access to the locality in question.

[213] See Luxton, above n 24 at 156 (specifically n 343); also below at 187.

[214] Although it is easy to envisage circumstances in which it might become charitable – e.g. as part of a religious festival, such as Diwali.

society is nonrivalous, as bestowing such a right on *x* does not take the same right away from *y*,[215] and also, by definition, nonexcludable, as denying such a right to certain citizens would render it no longer a fundamental human right. Under the pre-reform law, it was clear following *McGovern* v *Attorney General* that the promotion of human rights was inherently political,[216] although Picarda notes persuasive Australian authority for the proposition that the promotion of human rights may be charitable in jurisdictions where this is 'consistent with the way the law is tending'.[217]

Delivery of intangible services

Although every charitable purpose may potentially involve the delivery of some intangible service, four in particular can be justified by reference to this social function: (i) the relief of poverty, (ii) the advancement of education, (iii) the advancement of health and (iv) the relief of those in need. These have already been discussed in detail above.[218] Outside the charitable sector, wider organised civil society is engaged in similar activities – indeed, Kendall estimates that around three-quarters of the 'broad nonprofit sector' consists of CSOs that are concerned with the delivery of intangible activities (*videlicet*, those organisations concerned with education and research, culture and recreation, and social care).[219] A large number of

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[215] Although it is of course possible that, taken in isolation, specific human rights may impinge upon each other – *x*'s right to freedom of speech, for example, may impinge upon *y*'s right to privacy: see e.g. *Douglas* v *Hello Ltd* [2001] 2 All ER 289; *A* v *B (A Company)* [2002] 2 All ER 545; *Theakston* v *MGN Ltd* [2002] EWHC 137; *Cream Holdings Ltd* v *Banerjee* [2003] 2 All ER 318; *Campbell* v *Mirror Group Newspapers Ltd* [2004] 2 WLR 1232.

[216] [1982] Ch 321.

[217] *Public Trustee* v *Attorney General for New South Wales* (1997) 42 NSWLR 600, noted by Picarda, above n 184 at 179. See also Moffat, G., 'Charity, Politics, and the Human Rights Act 1998: Much Ado About Nothing?' (2002) 13 KCLJ 1.

[218] See above Ch 3 at 88 - 89.

[219] Kendall, above n 10 at 22. The 'broad nonprofit sector' is defined as including 'all entities which are formal organizations having an institutionalised character; constitutionally independent of the state and self-governing; nonprofit-distributing; and involve some degree of voluntarism' (*ibid* at 21; cf the structural / operational definition in Ch 2 above at 48 - 54). See also the Scottish Council for Voluntary Organisations, which estimates that 46% of the sector's activities are concerned with 'social care and development' (Scottish Council for Voluntary Organisations, *A Guide to the Voluntary Sector in Scotland 1998* (www.scvo.org.uk/research/reports, SCVO, 1998) at 4).

these CSOs are amateur sports clubs,[220] whose activities also tend towards the advancement of health.[221] The advancement of sport is not considered a charitable purpose *per se* under the old law, although, depending upon its objects, a sports club may be able to argue that it advances education[222] or it may fall under the Recreational Charities Act 1958.[223]

Redistribution of wealth

Every charity which is funded, either wholly or in part, by donations, is, of course, engaged in the redistribution of wealth, with the exception of those cultural CSOs whose donors are also users.[224] More specifically, this function is at the heart of (i) the relief of poverty, (ii) the relief of those in need, (iii) the relief of rates, (iv) resettlement and rehabilitation, (v) the welfare of children and (vi) the relief of prisoners, as each of these purposes necessarily involves the transfer of resources from donors to beneficiaries. We have also already noted that a number of charities for the advancement of education, notably fee-paying public schools, are concerned with the same.[225]

Outside the charitable sector, the provision of social enterprise, being the conduct of:[226]

> business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community,

may also be concerned with the redistribution of wealth – either by reinvesting surpluses in an appropriate community project, such as the relief of poverty, or by engaging in business practices such as voluntary price discrimination in order to

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[220] Kendall and Knapp estimate that there are around 150,000 such organisations (above n 113 at 113); see also Scottish Council for Voluntary Organisations, *SCVO Annual Forum Briefing* (www.scvo.org.uk/research/reports, SCVO, 2002) at 5 and 10.
[221] Prime Minister's Strategy Unit, above n 118, para 4.35.
[222] See below at 189.
[223] See above n 201.
[224] See above Ch 3 at 96 - 98.
[225] See above Ch 3 at 89.
[226] Department for Trade and Industry, *Social Enterprise: A Strategy for Success* (London, DTI, 2002) at 7.

provide services to those who could not otherwise afford to purchase them.[227] The provision of social enterprise is not *prima facie* charitable, as there is room for significant private benefit by virtue of the fact that it is acceptable for a limited amount of surplus to be distributed between members.[228] Further, we have already considered the role of housing associations in redistributing wealth;[229] whilst many associations fall within the charitable sector, those without exclusively charitable purposes, or which fail satisfy the public benefit requirement, fall outside.[230]

Facilitation of political action

A necessary consequence of the fact that political purposes cannot be charitable[231] is that no particular charitable purposes can be identified as being likely to promote this social function. However, any charity may be involved in political action if this is 'in furtherance of, and ancillary to' its charitable objects.[232] The result of these restrictions is that the promotion of political action for its own sake, rather than in pursuit of other social goals,[233] is carried out exclusively outside the charitable sector. The same is true of all political action undertaken in pursuit of social functions which cannot be achieved except by political means. The paradigm vehicles for these kinds of political action are, of course, the political party and the lobby group; however, other CSOs, such as housing associations, are frequently engaged in mission-related advocacy.[234]

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[227] See Steinberg, R., and Weisbrod, B., 'Pricing and Rationing by Nonprofit Organizations with Distributional Objectives' in Weisbrod, above n 31 at 70.
[228] However, it is entirely acceptable that a social enterprise whose governing document precludes any distribution of profit can be charitable.
[229] See above Ch 3 at 89.
[230] On the range of social housing-related objects and activities currently considered charitable by the Charity Commission, see generally Housing Corporation and Charity Commission, *Guidance for Charitable Registered Social Landlords* (www.charity-commission.gov.uk/supportingcharities/hcguide.asp, Charity Commission, 2004).
[231] See *Bowman* v *Secular Society Ltd* [1917] AC 406; *National Anti-Vivisection Society* v *Inland Revenue Commissioners* [1848] AC 31; *McGovern* v *Attorney General* [1982] Ch 321. These cases will remain good law after the Charities Bill 2004 is enacted: see ss 2(1)(b) and 3(3).
[232] Charity Commission, above n 143, para 10.
[233] See above Ch 3 at 56.
[234] See Kendall, above n 10 at 144 – 145.

Provision of cultural services

Three charitable purposes are concerned with the provision of cultural services: (i) the advancement of education, (ii) the advancement of religion and (iii) the advancement of the arts and heritage. The classification here of the last of these is self-explanatory. In relation to the others, it is clear that the first is not limited to traditional educational establishments, such as schools and universities, but can include the furtherance of cultural activities – in the words of Lord Greene MR:[235]

> a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being.

As far as the advancement of religion is concerned, it is clear that religious ceremonies, writings and buildings may form part of a particular society's culture and so it is appropriate that their promotion be included here.[236]

The advancement of the arts and heritage would appear to be virtually synonymous with the provision of cultural services. Therefore, it is likely that the only civil society activity which falls outside the charitable sector will be that which is denied charitable status for lack of public benefit – hence, whilst public museums and art galleries are inherently charitable, private museums and art galleries are not.[237]

Facilitation of self-determination

As with the redistribution of wealth, every charity which accepts donations facilitates self-determination by providing a channel for altruistic expression. Certain charities may also facilitate mutual support, although we have already considered that certain

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[235] *Royal Choral Society* v *Commissioners of Inland Revenue* [1943] 2 All ER 101 at 104; cited with approval by Vaisey J in *Re Shaw's WT* [1952] Ch 163 at 171.

[236] Each of these have been specifically accepted as charitable under the third head by the courts: see *Re Hetherington's WT* [1990] Ch 1 (on the charitable nature of the saying of public masses); *Thornton* v *Howe* (1862) 31 Beav 14 (on the charitable nature of religious texts); and the Preamble to the Statute of Charitable Uses 1601 (on the charitable nature of the repair of churches).

[237] Charity Commission, *RR10: Museums and Art Galleries* (London, Charity Commission, 2002), para 7.

types of mutual support would deny an organisation charitable status for lack of public benefit.[238] Three charitable purposes fit quite neatly under this head: (i) the advancement of religion, (ii) the advancement of citizenship or community development, and (iii) the advancement of moral or spiritual welfare each provide outlet for ideological expression.

There would appear to be three key areas of civil society activity outside the charitable sector which facilitate self-determination. First, there is the advancement of human rights – encouraging legal systems to provide for fundamental rights such as freedom of speech and association in turn enables ideological expression without the fear of reprisal. Second, there are a number of non-traditional religions, the most high profile of which is the Church of Scientology,[239] which are denied charitable status on the ground that they fail to satisfy charity law's definition of what constitutes a religion (namely, belief in, and reverence of, a supreme being).[240] Finally, it may also be that a case can be made for including the advancement of amateur sport in this category if we take a holistic approach towards the development of the autonomous personality.[241] Support for this approach may be found in the caselaw relating to the second head of charity, where it has been held that sport practised under the auspices of an educational establishment advances education,[242] as may an organisation which promotes sport for children without any nexus with an educational establishment.[243] However, this argument is somewhat weakened by the fact that sporting organisations for adults are not deemed to be inherently educational in the same way.[244] The Prime Minister's Strategy Unit report suggests that sport may also facilitate self-determination by 'encouraging participation and forging stronger communities'.[245]

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[238] See above Ch 3 at 103 - 104.
[239] Most recently denied charitable status in 1999: see *Decisions of the Charity Commissioners*, 17 November 1999; also *R* v *Registrar General, ex parte Sedergal* [1970] 2 QB 697. See below at 195.
[240] See e.g. *ex parte Sedergal*, above n 239; *Re South Place Ethical Society* [1980] 1 WLR 1565.
[241] See above Ch 3 at 98.
[242] *Re Mariette* [1915] 2 Ch 284; *Inland Revenue Commissioners* v *McMullen* [1981] AC 1.
[243] *Inland Revenue Commissioners* v *McMullen*, above n 242.
[244] See *Inland Revenue Commissioners* v *McMullen*, above n 242 at 18 *per* Lord Hailsham.
[245] Prime Minister's Strategy Unit, above n 118, para 4.35.

Facilitation of entrepreneurship

We have already noted that the facilitation of entrepreneurship is concerned with the processes through which the other functions of organised civil society may be achieved. Hence, all charitable purposes may be concerned with this final function to some extent. In terms of the facilitation of entrepreneurship as an end in its own right, charities that advance citizenship or community development may achieve this aim. Outside the charitable sector, the provision of social enterprise would seem to also tend towards this. Also the provision of social housing must be mentioned here: both charitable and non-charitable housing associations have been identified by Kendall as being characterised by innovative practices,[246] which we noted in Chapter Three will attract entrepreneurship.[247]

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[246] In particular, relating to use of technology, financing and diversification (Kendall, above n 10 at 145 – 146; see also at 148).
[247] See above Ch 3 at 106 - 108.

Function	Charitable purposes	Wider civil society activity
Market support	Education; citizenship; science; agriculture, industry & commerce	Professional association **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Public goods	Environment; national security; protection of life; public works; relief of rates; benefit of locality	Human rights **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Intangible services	Relief of poverty; education; health; relief of need	Sport **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Redistribution of wealth	Relief of poverty; relief of need; relief of rates; resettlement; care of children; relief of prisoners; education	Non-traditional religion; social enterprise; housing associations with non-charitable purposes **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Political action	All purposes but only so long as subsidiary and ancillary	All purposes; political self-determination **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Cultural services	Education; traditional religion; arts and heritage	Non-traditional religion **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Self-determination	Traditional religion; citizenship; moral and spiritual welfare; welfare-based recreation	Non-traditional religion; non-welfare-based recreation; sport; mutual support; human rights **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Entrepreneurship	All purposes to an extent; specifically citizenship	Social enterprise; professional association; mutual support; housing associations with non-charitable purposes **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit

Table 1: *Summary of the relationship between social function, the charitable sector and organised civil society prior to current reforms*

Function	Charitable purposes	Wider civil society activity
Market support	Education; citizenship; science; agriculture, industry & commerce	Professional association **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Public goods	Environment; national security; protection of life; public works; relief of rates; benefit of locality; human rights	Residual **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Intangible services	Relief of poverty; education; health; relief of need; sport	Residual **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Redistribution of wealth	Relief of poverty; relief of need; relief of rates; resettlement; care of children; relief of prisoners; education	Non-traditional religion; social enterprise; housing associations with non-charitable purposes **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Political action	All purposes but only so long as subsidiary and ancillary	All purposes; political self-determination **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Cultural services	Education; traditional religion; arts and heritage	Non-traditional religion **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Self-determination	Traditional religion; citizenship; moral and spiritual welfare; welfare-based recreation; sport; human rights	Non-traditional religion; non-welfare-based recreation; mutual support **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit
Entrepreneurship	All purposes to an extent; specifically citizenship	Social enterprise; professional association; mutual support; housing associations with non-charitable purposes **Plus** political pursuit of charitable purposes; pursuit of charitable purposes with private benefit

Table 2: *Summary of the relationship between social function, the charitable sector and organised civil society under the Charities Bill 2004*

Current reforms

It is apparent from the preceding analysis, summarised in Table 1, that a number of areas of civil society activity fall outside the scope of legal charity, despite sharing a functional basis with those that fall within it. This is ameliorated to some extent by

the current reforms, as both the Charity Commission's review of the register and the Charities Bill 2004 recognise the charitable status of (i) the advancement of human rights[248] and (ii) the advancement of amateur sport.[249] Taking this into account, Table 2 reveals that a modernised charitable sector is primed to dominate two social functions[250] – the provision of public goods and intangible private services – but that there are still significant areas that fall outside the charitable sector, and hence, in some cases,[251] outside the ambit of regulation, despite that the fact that they are functionally similar to those areas of activity which fall within the charitable sector. These are: (i) the advancement of non-traditional religion; (ii) the facilitation of political self-determination and the political pursuit of charitable purposes; (iii) the facilitation of professional association; (iv) social enterprise and the pursuit of otherwise charitable purposes for private benefit; (v) the advancement of non-welfare based recreation; (vi) the provision of social housing by means of purposes which are not considered charitable by virtue of lack of public benefit; and (vii) the facilitation of mutual support. There are several reasons why these areas of organised civil society fall outside legal charity. The exclusion of non-traditional religions can be explained partly by charity law's definition of religion and partly by reference to the need, in novel cases falling under the fourth head, to draw an analogy with an existing charitable purpose. The exclusion of the facilitation of political self-determination can be explained by reference to the rule against political purposes. The exclusion of the other areas can be explained by reference to the public benefit requirement. We shall consider each explanation in turn.

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[248] Specifically, 'the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity' (Charities Bill 2004, s 2(2)(h)); see also Charity Commission, *RR12: The Promotion of Human Rights* (London, Charity Commission, 2003).

[249] Charities Bill 2004, s 2(2)(g); Charity Commission, *RR11: Charitable Status and Sport* (London, Charity Commission, 2003).

[250] This is technically immediate: all CSOs with exclusively relevant purposes (and public benefit) are now charities. In practice, they will not fall within the reach of regulation by the Charity Commission until they go through the registration process, which the newborn charity trustees are required to do under the Charities Act 1993, s 3(7)(a).

[251] Certain CSOs will of course fall under other regulatory regimes by virtue of the area in which they operate (e.g. housing associations) or the legal forms they adopt (e.g. community interest companies).

Regulation and the law's attitude towards non-traditional religion

According to caselaw, religion for the purpose of the third head of charity requires (i) belief in a supreme being[252] and (ii) worship of that being.[253] Accordingly, in 1999 the Charity Commission refused an application for charitable status under this head by the Church of Scientology because, although it recognises the existence of a supreme being,[254]

> the core practices of Scientology, being auditing and training, do not constitute worship as they do not display the essential characteristic of reverence or veneration.[255]

The issue of whether or not the Church of Scientology deserves to be recognised as a religion is one which falls outside the scope of this thesis. However, for our purposes it is important to note that, whatever its official status, the church falls within both our structural and functional definition of organised civil society – being voluntary,[256] organised,[257] non profit distributing, independent and established for the facilitation of self-determination. It would therefore be logical to assume that the church could have been deemed charitable under one of the other purposes connected with self-determination, the most obvious being the advancement of moral and spiritual welfare under the fourth head. In fact, the Charity Commission rejected this possibility on the ground that despite the public availability of some Scientology literature, its principles of Scientology were not sufficiently 'accessible' to the general public without joining the organisation.[258] We shall consider the issue of public benefit in more detail below.

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[252] *Ex parte Segerdal*, above n 239.
[253] *Re South Place Ethical Society* [1980] 1 WLR 1565.
[254] The Commission was clearly uncomfortable even with this, concluding merely that 'it *could* be accepted that Scientology claims to profess belief in a supreme being' (*Decisions of the Charity Commissioners*, 17 November 1999 at 25, italics added).
[255] *Decisions of the Charity Commissioners*, 17 November 1999 at 1, 26.
[256] The church is staffed partly by volunteer ministers and funded in part by organised donations from members. The Charity Commission notes that donations are made in return for participation in the organisation's core practices (above n 255 at 36) and that the size of donation varies across the membership (at 5 – 6); this could therefore be seen as an example of voluntary price discrimination discussed earlier in context of cultural services (see above Ch 3 at 97- 98).
[257] Taking the form of a company limited by guarantee (above n 255 at 2).
[258] Above n 255 at 36.

Regulation and the ban on political purposes

We have already considered the extent to which it is appropriate to restrict campaigning by CSOs.[259] However, we can make a number of further points here in relation to whether it is appropriate to treat political action by charities any differently to that of other CSOs, specifically: (i) whether the constraints of charity law necessitate the prohibition and (ii) whether it is appropriate to exclude political CSOs from regulation (as a separate issue from the need to limit the conduct of any political campaigning).

Constraints of charity law

In relation to the first issue, the prohibition on charities having political purposes, or engaging in political activities above and beyond those which are in furtherance of, and secondary, to their charitable objects,[260] is explained in the caselaw as being a necessary consequence of the requirement of public benefit. In the words of Lord Parker:[261]

> a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

To the extent that public benefit is the stumbling block which requires charities to be treated differently to the rest of organised civil society, we can say three things. First, despite the words of Lord Parker, the courts seem to have proved on more than one occasion that they are quite comfortable with the notion of judging whether a change in the law would be for the public benefit. For example, in *National Anti-Vivisection*

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[259] See above Ch 4 at 129 - 131.
[260] Charity Commission, n 143, para 10.
[261] *Bowman* v *Secular Society Ltd* [1917] AC 406 at 442; cited with approval by the House of Lords in *National Anti-Vivisection Society* v *Inland Revenue Commissioners* [1948] AC 31 at 61 *per* Lord Simonds (with whom Viscount Simon concurred at 40), at 50 *per* Lord Wright, at 77 *per* Lord Normand; also *McGovern* v *Attorney General* [1982] Ch 321 at 334 *per* Slade J.

Society v *Inland Revenue Commissioners*,[262] where Lord Parker's comments were expressly cited with approval by the House of Lords, the court nonetheless denied the Anti-Vivisection Society charitable status not only because the object of securing a total ban on vivisection required a change in the law and was therefore inherently political, but also because on balance it would be to the detriment of the public. In the words of Lord Simonds:[263]

> where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object.

Similarly, the courts have held other purposes to be unquestionably beneficial to the public in one respect and yet felt unable to find any public benefit by virtue of their political nature – for example, the 'philanthropic purposes of an excellent character' contained in the Amnesty International Trust in *McGovern* v *Attorney General*.[264] It seems, then, that the courts feel competent to hold that organisation *x* – whose object is to pursue charitable purpose *z* through non-political means – satisfies the public benefit test, but that organisation *y* – whose object is also to pursue *z*, but through political means – is not charitable because they are no longer able to find public benefit. In each of these situations, the end result – the implementation of *z* – is the same, so where does the public benefit go? With no other variables, the only way of reconciling these two positions is to say that must be something about the political process itself that potentially negates the public benefit inherent in *z*. This explanation is consistent with the approach of the House of Lords in the *Anti-Vivisection* case, where it was held that a purpose could simultaneously benefit the public in some regards yet be detrimental in others, and be denied charitable status if the detriment outweighed the benefit.[265] In this situation, though, it appears that the courts are not saying that engaging in the political process *necessarily* outweighs the public benefit, simply that

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[262] Above n 261.

[263] Above n 261 at 65; see also at 47 *per* Lord Wright: 'There is not, so far as I can see, any difficulty in weighing the relative value of … the material benefits of vivisection against the moral benefit which is alleged or assumed as possibly following from the success of the appellant's project'.

[264] Above n 261 at 329 *per* Slade J.

it may do so; hence they conclude that they are unable to find public benefit, rather than find a clear lack of public benefit.

There are certainly a number of ways in which pursuing an otherwise valid charitable purpose by political means could be viewed as detrimental to the public. For example, we can draw an analogy with the administrative law cases where the courts have been reluctant to interfere with decisions involving the allocation of finite resources, on the ground that when there is sufficient money only to fund activity *a* or *b*, but not both, it would inappropriate to take the decision out of the hands of the body charged with making it.[266] In the same way, it could be argued that, if purpose *z* requires a change in the law (or in government policy), then, because parliamentary time (or the time of the relevant government department) is finite, the courts are not in a position to decide that *z* will lead to greater public benefit than the purpose which would otherwise occupy the legislators. On the other hand, preventing a change in the law does not necessarily involve parliamentary time,[267] yet a CSO formed for this purpose would also be deemed political.[268] In any event, the leading cases do not appear to consider the problem to be one of process.[269]

In fact, if the courts were of a mind to tolerate greater political action by charities, it is submitted that it would be a simple matter to find that there is significant public benefit inherent in pursuing a charitable purpose (or some other social good, for that matter) through political means. We have already noted in detail the benefits of political action, both generally and in relation to organised civil society:[270] if charitable purpose *z* is inherently beneficial and is pursued through political means, it could be argued that a *greater* public benefit will accrue than if the pursuit of *z* were undertaken in another way.[271]

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[265] Above n 261 at 60 *per* Lord Simonds.

[266] E.g. *R* v *Gloucestershire CC, ex parte Barry* [1977] AC 584; applied in *R* v *Sefton MBC, ex parte Help the Aged* [1997] 4 All ER 532.

[267] Although it might: e.g. a CSO's campaign against the introduction of a particular bill, and a hence a change in the law, may provoke extended debate in Parliament.

[268] *Re Hopkinson* [1948] 1 All ER 346.

[269] It is the end product, the change in the law, which is deemed problematic: see the *Anti-Vivisection* case, above n 261 at 50 *per* Lord Wright.

[270] See above Ch 3 at 91 - 96.

[271] Of course, there may be alternative processes through which *z* could be pursued which would also increase the element of public benefit.

We should also briefly note at this point the words of Lord Wright in the *Anti-Vivisection* case, who was concerned about 'usurping the functions of the legislature'.[272] In fact, the notion that approving the charitable status of a CSO with political objects would involve the court stepping into the shoes of Parliament is misguided for two reasons. First, the decision whether to grant an organisation with political objects charitable status is, in itself, unlikely to be determinative of whether the organisation in question goes on to pursue them,[273] unless the organisation is structured around a testamentary purpose trust, which would fail if denied charitable status.[274] More importantly, even if an organisation were to pursue such objects, it does not follow that this would result in the desired change in the law or government policy: permitting a charity to pursue a political purpose would in no way tie the hands of the legislature and compel them to carry out its bidding.

One final problem inherent in the existing system of charity law stems from the fact that the Attorney General has a general responsibility for the enforcement of charitable trusts (and, by extension, the purposes of charitable companies).[275] If a political trust were upheld as charitable and its trustees defaulted or acted in breach of trust, this might place the Attorney General in a somewhat awkward position – in the words of Lord Simonds:[276]

> … my Lords, is it for a moment to be supposed that it is the function of the Attorney-General on behalf of the Crown to intervene and demand that a trust shall be established and administered by the court, the object of which is to alter the law in a manner highly prejudicial, as he and His Majesty's Government may think, to the welfare of the state?

Such a situation would clearly give rise to a conflict of interest and there would be strong incentive for the Attorney General either to refuse to intervene or mount a

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[272] Above n 261 at 50.
[273] Although it may determine the resources which the organisation is able to make available for said objects.
[274] Although an *inter vivos* purpose trust would also fail, the settlor would of course be in a position to select an alternative vehicle, such as a company, to carry out the desired objects.
[275] See below Ch 6 at 211 - 212.
[276] Above n 261 at 62 – 63.

ineffectual action for the sake of appearance.[277] A similar problem may arise with the Charity Commission, although here there is at least some degree of political insulation from the central government that is lacking in the case of the Attorney General, in that the Commissioners are not members of the government.[278] It is suggested that, whilst this problem is insurmountable by the courts, it would be a relatively straightforward legislative matter to transfer the Attorney General's role in relation to charities to an officeholder outside central government. Therefore, it should not be an insuperable barrier to recognising political purposes as charitable.

Exclusion of political CSOs from regulatory strategy

The prohibition of political purposes is sometimes regarded as being linked with the fiscal benefits afforded charities by the state:[279] some commentators criticise what is seen as a trade-off whereby the state buys political 'silence' in return for tax relief.[280] Therefore, the prevailing attitude amongst those who call for reform tends to be that charities are over-regulated with respect to political action. Calls for charities to be

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[277] Luxton notes that the relator action is now 'obsolete' following the creation of charity proceedings under s 33 of the Charities Act 1993 (above n 24 at 512), which enable interested members of the public to bring actions to enforce the due administration of a charity (see below Ch 8 at 250 - 251). Use of charity proceedings would certainly resolve the conflict of interest issues; however, the Attorney General still has jurisdiction to bring actions on behalf of the Crown or the Charity Commission (see below Ch 6 at 211); further, although obsolete, the jurisdiction to bring a relator action remains.

[278] Charity matters are dealt with at governmental and cabinet level by the Home Secretary. Although the Home Secretary is responsible for appointing Commissioners (Charities Act 1993, Sched 1, s 1(3), the Commission is not responsible to him on a day-to-day basis except in relation to its organisational efficiency (Charity Commission, *CC2: Charities and the Charity Commission* (London, Charity Commission, 2002), para 4).

[279] See e.g. Woodfield Committee, *Charities: A Framework for the Future* (1989, Cm 694) at 11; 6, P. and Randon, A., *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Aldershot, Dartmouth, 1995) at 152; Sprince, A., 'Political Activity by Charitable Organisations' (1997) 11 TLI 35 at 35. Note also the United States approach to political activity, whereby campaign funds are excluded from the tax benefits available to charities: on which see generally Chisolm, L., 'Politics and Charity: A Proposal for Peaceful Coexistence' (1990) 58 *George Washington Law Review* 308. Interestingly, the Prime Minister's Strategy Unit report makes no connection in its discussion of the restrictions on campaigning (above n 118, paras 4.49 – 4.56), although it may be that less attention was given to this issue than other potential areas of reform, as it appears that there is little demand for legislative action in this area at the moment (the Home Office records that there was 'no general desire among respondents [to the Strategy Unit report] for changing the law to allow charities either more or less freedom to campaign than the law gives them at present' (Home Office, *Charities and Not-for-Profits: A Modern Legal Framework* (London, Home Office, 2003), para 3.35).

[280] Sprince, above n 279 at 37.

treated in the same way as other CSOs accordingly argue towards the removal of the restraints placed on charities.

From a regulatory perspective, however, this approach is misguided. Under the current law, the effect of finding that *x* is too political, by virtue of its objects or activities, is immediately to place it outside the scope of regulation. More specifically, it is clear from the preceding analysis that politically active CSOs are structurally and functionally synonymous with charitable CSOs,[281] and thus the problems which may affect the charitable sector such that regulatory intervention is warranted are just as likely to affect to political CSOs.[282] Therefore, if it is appropriate to regulate charities, it would also seem appropriate to regulate those other CSOs, regardless of whether we can find any public benefit in promoting a political purpose.[283] Focusing regulation on the charitable sector, where this is defined so as to exclude political purposes, is therefore untenable.

(3) The government position

It is clear from the preceding analysis that there are no theoretical grounds on which to differentiate between the charitable sector and organised civil society when justifying and designing a regulatory strategy. Nevertheless, the existing regulatory strategy and the current reforms focus on the charitable sector. The government position is that:

> The regulation of charities as a specific class of non-for-profit organisation is justified by three factors: (1) The basic legal requirement that charities operate for public, not private benefit. (2) The fact that public confidence in charities derives from a knowledge that charities are altruistic in purpose … and the belief that there is regulatory oversight which will identify and deal robustly with misconduct and mismanagement. (3) Tax and business rate reliefs.[284]

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[281] E.g. the political activities more traditionally associated with pressure groups are 'a natural and almost inevitable extension' of certain charitable activities such as the provision of public goods (Douglas in Powell, above n 1 at 51); cf the Charity Commission's policy decision to allow charities to undertake a limited amount of political activity so long as it is 'incidental or ancillary to' otherwise charitable objects' (Charity Commission, above n 143, para 23).

[282] See generally Ch 4, especially at 119 - 121.

[283] A similar argument exists in relation to those CSOs which are unable to demonstrate public benefit: see below at 203 - 204.

[284] Prime Minister's Strategy Unit, above n 118, para 7.1 (numerals added).

As the second factor stems from the first, we shall consider the first two justifications together.

Public benefit, altruism and public confidence

The requirement that charities demonstrate public benefit means that a charity must show (i) that its purpose will bring about a benefit for a sufficient cross-section of society[285] and (ii) that any benefit that accrues to private individuals is either 'legitimately incidental' to or 'in direct pursuit of' its legally charitable purposes.[286]

The public benefit test is clearly a useful way of delineating between the private sector and organised civil society, as it excludes all organisations operated on a for-profit basis, which formed the basis of our definition of the private sector in Chapter Two.[287] However, the test is under-inclusive, as the line around the charitable sector is drawn in such a way that certain CSOs are also excluded. For the purposes of sector definition, the public benefit distinction manifests itself in two ways. First, it excludes from the charitable sector those CSOs with certain objectives.[288] The objectives in question cannot be considered charitable purposes (namely, those listed in the right hand column of Table 2) because they necessarily involve a significant element of private benefit. Second, it excludes from the charitable sector those CSOs with charitable objectives but which choose to pursue those objectives in a manner that involves a significant element of private benefit (again, listed in the right hand column of Table 2). Thus, social enterprises, mutual organisations such as support networks, business associations and trade unions, and recreational societies all fall outside the scope of charity, and, hence, outside the scope of sector-based regulation.[289]

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[285] The test for what constitutes a sufficient cross-section varies across the heads of charity: see above Ch 2 at 43 - 44.

[286] Charity Commission, *RR8: The Public Character of Charity* (London, Charity Commission, 2001), para C2.

[287] See above Ch 2 at 39.

[288] It would seem apparent from Table 2 that it is certainly not an inability to draw analogy with existing charitable purposes that prevents these purposes from being charitable – every purpose in the right hand column is inherently analogous to those charitable purposes which fall under the same social function: e.g. the promotion of professional association is analogous with the promotion of agriculture, industry and commerce in the sense that they both provide market support.

[289] They may of course still be regulated by virtue of their choice of organisation.

It is suggested that the distinction between CSOs which provide a public benefit and those which provide a private benefit is not sufficient to justify excluding the latter from our regulatory strategy, despite the concern that extending regulation to cover other CSOs 'would risk stifling socially-beneficial activity for little gain'.[290] First, the government notes that the altruism resulting from the public benefit requirement means that 'accountability in the charity sector can be less direct than that to shareholders and consumers in the private sector'.[291] This is undoubtedly true, for those CSOs which facilitate altruism are necessarily involved in the redistribution of wealth. The nature of wealth redistribution is that the consumer (or beneficiary) of a good or service is not the same person as the financer (or donor), and hence the natural position is one of information asymmetry.[292] Without some form of regulation, there is clear potential for abuse in this situation. However, there are issues of accountability in relation to non-charitable areas of organised civil society. We have already noted that at least four of the sector's social functions – the provision of public goods, complex private services and cultural services, and the facilitation of political action – are premised on the same basis as the redistribution of wealth; namely, the fact that CSOs are thought to be more trustworthy than the private sector. Information asymmetry is also a key feature of each of these functions – hence the need for a trustworthy service provider – and so it is surely at least as important to regulate CSOs operating for mutual benefit in these areas of civil society activity as it is to regulate those based on altruistic endeavour. Indeed, regulation may be even more pressing here, as the presence of private benefit may operate as an additional corrupting influence.

An important issue also arises in relation to those organisations that provide a combination of public benefit and private benefit. The requirement that charities have exclusively charitable purposes[293] means that, unless the private benefit is limited to the 'legitimately incidental',[294] such organisations will be excluded from regulation. The paradigm example of such an organisation is the social enterprise, which cannot be charitable unless its profits are reinvested in the enterprise as a matter of course. It

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[290] Prime Minister's Strategy Unit, above n 118, para 7.2.
[291] Prime Minister's Strategy Unit, above n 118, para 7.2.
[292] See above Ch 3 at 89 - 90.
[293] *Morice* v *Bishop of Durham* (1805) 10 Ves 522.
[294] See above n 286 and related text.

is not at all clear that regulation of social enterprises is not warranted – although investors will certainly have incentive to monitor the way in which a social enterprise is run, and so there is an additional check lacking in charitable CSOs, this would seem to be balanced out by the additional concern that the same investors have an incentive to abuse their position so the balance between the organisation's pursuit of profit and its social objectives is tipped in their favour.

The second reason why it is inappropriate to exclude from regulation those CSOs that operate for private benefit is that there are justifications for regulating organised civil society beyond the need to remedy information deficits. Specifically, regulation may also be required to prevent anti-competitive practices,[295] co-ordinate resources[296] and control the conduct of campaigns.[297] Again, these are issues which also affect CSOs regardless of function and structure, and regardless of public or private benefit.

Tax relief

Finally, we must address the use of tax relief as a justification for regulation. The desire to 'safeguard the interests of taxpayers'[298] is certainly understandable. If the state is going to devote public funds to the charitable sector by excepting constituent organisations from liability for certain taxes, it will naturally want to ensure that mechanisms are in place to ensure the funds are being used appropriately.[299] Some treat tax relief as being linked inextricably to the concept of public benefit[300] – in the words of O'Halloran and Cormacain:

> The moral basis enabling the state to exempt a charitable trust from certain tax and other financial impositions rests on the premise that a donor has chosen

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[295] See above Ch 4 at 124 - 125.
[296] See above Ch 4 at 138 - 140.
[297] See above Ch 4 at 129 - 131.
[298] Prime Minister's Strategy Unit, above n 118, para 7.2.
[299] The state's general concern for obtaining 'value for money' when devoting funds to organised civil society is explicit: Parliamentary Select Committee on Public Accounts, *Distribution of Lottery Funds by the English Sports Council* (HC 873, 1998), para 4(xi). See also Parliamentary Select Committee on Public Accounts, *Department of the Environment, Transport and the Regions: Grants to Voluntary Bodies* (HC 158, 1999), para 26.
[300] See e.g. *Dingle* v *Turner* [1972] AC 601 *per* Lord Cross at 29 – 30, although His Lordship's comments were explicitly rejected by the rest of the House of Lords (with the exception of Lord Simon): see at 614 *per* Viscount Dilhorne, Lord MacDermott and Lord Hodson; noted by Luxton, above n 24 at 30; see also Picarda, above n 79 at 25.

> not to confer a private benefit upon a personally selected recipient but to instead make an altruistic gift for the public good.[301]

If this is correct, then *prima facie* it seems entirely proper to focus regulation on the charitable sector. However, there are three issues which suggest otherwise. First, although it may well be that, as a matter of political pragmatism, it is necessary to justify tax relief on this ground,[302] there are in fact other sound justifications for giving fiscal benefits to CSOs – for example, as a response to voluntary failure by virtue of philanthropic insufficiency.[303] Second, justifying regulation in this way (i) assumes that it is appropriate to grant assorted tax breaks to the charitable sector and (ii) assumes that it is inappropriate to grant other CSOs the same. Although it will be argued in Chapter Six that financial support from the state may have a role to play in a regulatory strategy, it will hopefully be apparent from our functional and structural comparisons that, where financial aid is appropriate, there is no reason to restrict this to the charitable sector. In any case, as Luxton notes, the current tax relief for which charities are eligible is not such that the sector as a whole is benefited. Rather,[304]

> [t]he reliefs themselves are very specific, and changes in general taxation can cause charities to lose reliefs they had previously enjoyed.

Finally, even if we agreed that tax relief in itself warranted regulation, it does not follow that the remainder of organised civil society does not need regulatory support for the reasons discussed above.[305]

D. CONCLUSION

This chapter has attempted to highlight some of the practical problems that may arise when designing regulation based, at least in part, upon a sector-based analysis of society, through an analysis of the relationships between organised civil society and

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[301] O'Halloran, K., and Cormacain, R., *Charity Law in Northern Ireland* (Dublin, Round Hall Sweet and Maxwell, 2001) at 29.
[302] Interest groups are quick to raise objects if they believe that charities are receiving an unfair advantage over the private sector: consider the government response to the Prime Minister's Strategy Unit proposal to amend the rules on trading via a subsidiary company, noted above at 168.
[303] See above Ch 3 at 79 - 80; also above Ch 4 at 138.
[304] Luxton, above n 24 at 30.
[305] See above at 204.

the market, the state, the informal sector and the charitable sector. As part of this analysis, we have attempted to demonstrate that focusing regulation on the charitable sector alone, even in light of the current reforms to the definition of the sector, is not theoretically sound in the absence of any evidence demonstrating philanthropic insufficiency or particularism specific to the charitable sector. With these issues in mind, along with the theory of regulation proposed in the previous chapter, we are now in a position to consider in the final three chapters how the implementation of civil society regulation might best be achieved.

PART THREE

IMPLEMENTING REGULATION

CHAPTER 6

Models of Regulation

A. INTRODUCTION

Having considered in the previous two chapters (i) the justifications for regulating organised civil society and (ii) the problems inherent in treating the sector as a cohesive unit for the purpose of regulation, we can now turn to the issue of how regulation might best be implemented. Accordingly, in this and the next two chapters we shall examine the range of regulatory models and strategies available to the state, and consider whether there are any specific issues in relation to organised civil society that might favour the use of certain models or strategies, or a combination thereof, over others. This chapter considers the advantages and disadvantages of the various state institutions that might be charged with regulation, namely: (i) the legislature; (ii) the courts; (iii) the executive; (iv) executive agencies; and (v) office-holders.

Simon suggests that, so long as a regulatory body is well-trained, has only limited discretion and applies clear rules,[1] then 'it does not seem to matter much who the regulator… is'.[2] However, there are good reasons for thinking that some bodies make better regulators than others, and it will be argued here that an executive agency is the body best suited to regulate organised civil society, particularly given the blurred nature of the sector's boundaries that we discussed in Chapter Five.[3] However, we shall also suggest that the need to ensure the trustworthiness of CSOs[4] means that a secondary role for the judiciary may be appropriate, withstanding the limitations of regulation by the courts. Finally, the role of self-regulation, as a supplement to state regulation, is considered.

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[1] See further below Ch 7 at 234 - 238.
[2] Simon, K., *The Role of Law in Encouraging Civil Society* (www.icnl.org, International Center for Not-for-Profit Law, 1999) under 'Who are the regulators'.
[3] See above Ch 5 at 153 - 158.
[4] See above Ch 4 at 132 - 137.

B. REGULATION BY THE LEGISLATURE

It is generally accepted that the legislature is not a body suited to sector-specific regulation. In the words of Ogus:[5]

> Uncontroversially, it may be assumed that the legislature has [not] the time … to engage in detailed regulatory rule-making.

Although regulation by the legislature will obviously have a democratic mandate,[6] and may therefore be considered more legitimate than regulatory rules made by other bodies,[7] the legislature is inherently inexpert,[8] as it must deal regularly with rule-making in relation to all areas of social, political and economic life. Its size and organisational structure mean that passing a new piece of regulation would be a lengthy process,[9] making it difficult to respond quickly to changes in the regulated sector; this would be exacerbated by the fact that there would be competition for Parliamentary time from other areas requiring legislation.[10] Baldwin and Cave also

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[5] Ogus, A., *Regulation: Legal Form and Economic Theory* (Oxford, Clarendon Press, 1994) at 105.

[6] See generally Baldwin, R., *Rules and Government* (Oxford, Clarendon Press, 1995) at 43; Baldwin, R., and McCrudden, C., *Regulation and Public Law* (London, Weidenfeld and Nicolson, 1987) at 35.

[7] Baldwin, R. and Cave, M., *Understanding Regulation: Theory, Strategy and Practice* (Oxford, OUP, 1999) at 73. Of course, a democratic mandate is not the only yardstick against which the legitimacy of a regulator may be measured and Baldwin identifies four others: accountability, due process, efficiency and expertise (see above n 6 at 43 - 46).

[8] Baldwin and Cave, above n 7 at 66; Baldwin and McCrudden, above n 6 at 35; Ogus, above n 5 at 105.

[9] This is well-illustrated by recent charity law primary legislation: the Charities Act 1960 received Royal Assent on 26 July 1960, eight and a half years after the publication of the report on which it was based (Committee on the Law and Practice relating to Charitable Trusts (Nathan Committee), *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmnd 8710, 1952)); the Charities Act 1993 received Royal Assent on 27 May 1993 (previously the Charities Act 1992, on which much of the 1993 Act is based, received Royal Assent on March 16 1992), four years after the publication of the white paper on which it was based (Home Office, *Charities: A Framework for the Future* (London, HMSO, Cmnd 694, 1989)), which can in turn be traced back to the Woodfield Committee report two years previously (Woodfield Committee, *Efficiency Scrutiny of the Supervision of Charities* (London, HMSO, 1987)); the current Charities Bill has its origins in the review undertaken by the Prime Minister's Strategy Unit (*Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (London, HMSO, 2002)), published over two years before the Bill was introduced to the House of Lords on 20 December 2004.

[10] Consider, for example, the infrequency of primary legislation relating to the charitable sector (see above n 9).

note that there are problems of 'coherence and consistency',[11] in that every piece of legislation is considered at bill stage by its own Parliamentary committee, and not by those responsible for the previous regulatory provisions. The justifications for regulating organised civil society do not suggest in themselves that the legislature might be an appropriate regulator. Of course, the legislature will still have an important part to play: for example, by authorising the creation of a regulatory agency,[12] or legislating so as to set in place the bare structure of a regulatory regime to be fleshed out by a more appropriate body in the future.[13] Indeed, one of the ways in which a regulator may seek legitimacy for its actions is by reference to a mandate from the legislature.[14]

C. REGULATION BY THE COURTS

Regulation by the courts is also usually considered inappropriate on the ground that it is difficult for the courts to reflect policy considerations in a manner that is consistent with those of the incumbent administration. This is largely due to three reasons: (i) constitutional arrangements whereby the courts operate, in theory at least,[15] independently of both the executive and the legislature;[16] (ii) the fact that the judiciary

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[11] Above n 7 at 66.

[12] As it did with the Charity Commissioners and is set to do with the newly established Charity Commission: see below nn 76 and 77.

[13] Such fleshing out could be undertaken by a regulatory agency (consider, for example, the Charity Commission's interpretation of its broad legislative mandate under the Charities Act 1993, ss 1(3), 3(1) and 3(4), on which see above Ch 1 nn 39 – 46 and associated text), the executive (for example, the Companies (Audit, Investigations and Community Enterprise) Act 2004, ss 58 and 62(1), provides that the Secretary of State may use statutory instruments to implement the general principles of the Act (see below n 80)) or even the courts (for example, the courts' interpretation of the scope of the existing four heads of charity effectively determines the reach of the current regulatory regime; this will continue to be the case under the proposed reforms). See further below at 216 - 220.

[14] See generally Baldwin, above n 6 at 43; Baldwin and McCrudden, above n 6 at 35; Baldwin, and Cave, above n 7 at 73.

[15] It is a trite observation that the current system in England, whereby the senior judiciary sit in the House of Lords and the Lord Chancellor is also a member of the executive, clearly flaunts the principle of the separation of powers (although the current incumbent, Lord Falconer, has publicly agreed never to sit in a judicial capacity for this reason: see Department for Constitutional Affairs, *Constitutional Reform: Reforming the Office of Lord Chancellor* (CP 13/03, London, DCA, 2003) at 5 – 6). At the time of writing, the current Labour government plans to remedy both of these anomalies: on the former, see Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom* (CP 11/03, London, DCA, 2003).

[16] Baldwin and Cave, above n 7 at 67.

will tend to lack expertise in the sector's operation;[17] and (iii) the fact that any policy decisions can only be made on a 'sporadic' basis as and when regulated organisations appear before the courts[18] – for example, as parties to a dispute[19] or as applicants for entry into the sector where entry is controlled.[20]

(1) Separation of Powers

There are a number of ways of addressing the first two problems. A degree of policy co-ordination can be achieved by giving a government representative the right to be joined as a party in those actions that are of regulatory concern. Indeed, this approach forms part of the regulatory strategy in England: the Attorney General is entitled to bring court actions (i) on behalf of the Crown as *parens patriae* and (ii) in his own name at the request of a relator,[21] in order to protect the interests of charity.[22] He is also entitled to be joined as a party where it is necessary that the court should be addressed on 'the general system and principles that ought to govern charities'.[23] Before the court he is variously able to represent (i) the public interest,[24] (ii) the objects of the charity in question (in essence standing in the same position as the beneficiaries would in the case of a private trust),[25] (iii) the interests of the charitable sector in general[26] and (iv) the Charity Commission,[27] and so there is clearly scope for

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[17] Baldwin and Cave, above n 7 at 68.
[18] Baldwin and Cave, above n 7 at 74.
[19] Any policy pronouncements must be relevant to the dispute in hand – e.g. an action for breach of trust may throw up any number of policy ramifications relating to the good administration of a charitable trust, whilst an action for breach of contract where the fact that one of the parties is a CSO is wholly immaterial would be an inappropriate forum for policy-making. Of course, the distinction between *obiter dicta* and *rationes decidendi* means that a court can discuss issues that do not relate directly to the case in hand, but convention requires that there is some connection between the two.
[20] See e.g. when the High Court is called upon to determine whether a CSO is charitable. Outside the context of organised civil society, the courts are responsible for granting licences that enable entry into several industries – e.g. liquor licences and gambling licences (both dealt with by the Magistrates' Court).
[21] Being anyone who is concerned as to the administration of the charity in question: unlike charity proceedings (on which see below Ch 8 at 250 - 251) there is no requirement that the relator have any interest in the charity as such (*Attorney General* v *Vivian* (1826) 1 Russ 226).
[22] See *Ware v Cumberland* (1855) 20 Beav 503; *Re King* [1971] 2 Ch 420.
[23] *Ware* v *Cumberland*, above n 22 at 511 *per* Sir John Romilly MR.
[24] *Re Sekeford's Charity* (1861) 5 LT 488.
[25] See *Attorney General* v *Wright* [1988] 1 WLR 164 at 165 *per* Hoffman J.
[26] *Ware* v *Cumberland*, above n 22 at 511 *per* Sir John Romilly MR.

policy issues to be addressed. The Attorney General's role is likely to be consolidated in the proposed reforms in relation to actions involving the Charity Appeal Tribunal. The original draft bill of the Charities Bill,[28] if enacted, would have inserted a new clause into s 2 of the Charities Act 1993, providing that where the Attorney General is not already a party to proceedings, the Tribunal could require that 'all necessary papers' are sent to him,[29] and that he may either 'intervene … in such manner as he thinks necessary or expedient'[30] or address the Tribunal on 'any question … which the Tribunal … considers it necessary to have fully argued'.[31] However, the relevant clause was dropped in the version of the Bill presented to Parliament, following concerns from the Attorney General with regard to its resource implications.[32] The extent of the Attorney General's role in relation to proceedings before the Charity Appeal Tribunal is now unclear, as the formulation of the rules relating to the practice and procedure of the Tribunal are to be delegated to the Lord Chancellor,[33] and at the time of writing draft rules are yet to appear. However, we can note that the Government's response to the Joint Committee's report recognises that the Attorney General should be able to refer cases to the Tribunal, and, pursuant to this, make representations before it.[34]

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[27] This is only appropriate where the Commission and Attorney General are in agreement; when they are not, the Charity Commission should be made a party and represent its own interests (*Jones* v *Charity Commissioners of England and Wales* [1972] 1 WLR 784 at 785 *per* Ungoed-Thomas J).

[28] Cm 6199 (2003 - 2004).

[29] Charities Act 1993, s 2D (2), inserted by Charities Bill 2004, s 6(1).

[30] Charities Act 1993, s 2D (4)(a), inserted by Charities Bill 2004, s 6(1).

[31] Charities Act 1993, s 2D (4)(b), inserted by Charities Bill 2004, s 6(1). All these provisions also apply to appeals to the High Court from the Tribunal: Charities Act 1993, ss 2D(1), 2D(2) and 2(D)4, inserted by Charities Bill 2004, s 6(1).

[32] See Letter to Lord Phillips of Sudbury from the Attorney General, The Rt Hon The Lord Goldsmith QC (DCH 362), reprinted in House of Lords and House of Commons Joint Committee on the Draft Charities Bill, *Draft Charities Bill Volume 1: Report, Formal Minutes and Evidence* (HL Paper 167-i, HC 660-i, London, HMSO, 2004) at 200 – 201; note also the Joint Committee's report, *ibid*, para 241; Home Office, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill Session 2003 – 2004* (Cm 6440, London, HMSO, 2004), para 27.

[33] Charities Act 1993, s 2B(2), inserted by the Charities Bill 2004, s 8(1).

[34] Home Office, above n 32, para 27.

(2) Lack of Expertise

Two points can be made in relation to the courts' perceived lack of expertise. First, regulation by a dedicated court or tribunal will clearly tend toward expertise more than regulation by a court that routinely deals with other matters as well. For example, in addition to hearing charity law cases, the Chancery Division of the High Court deals at first instance with a wide range of other matters.[35] Second, expertise can also be drafted in by using expert witnesses, as in *Poplar Housing and Regeneration Community Association Ltd* v *Donoghue* where the Court of Appeal considered witness statements from academic lawyers at the Universities of Bristol and Newcastle in order to determine whether a charity was a public authority for the purpose of the Human Rights Act 1998.[36]

(3) Sporadic nature of policy decisions

The third problem cannot be resolved solely within the judicial system, i.e. without recourse to additional regulatory mechanisms. It is intrinsic to the operation of any court or tribunal that judgments can only be made upon the application of a party, whether this is an action against another party, an application for a licence or a application for a declaration of the court. Hence, policy decisions can only be made as and when a case featuring the relevant issues comes before the court. As a consequence, it would be difficult to argue for any sector-specific regulatory strategy consisting entirely of regulation by court or tribunal.

A good example of this in the context of charity law is the status of organisations that promote skill in shooting. For most of the twentieth century it was accepted that such organisations were charitable on the strength of the High Court decision in *Re Stephens*,[37] which upheld a bequest to the National Rifle Association

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[35] Namely, matters involving private trust law, the sale of land, mortgages, the administration of estates, bankruptcy, company and partnership law, the rectification of documents, probate, trademarks and patents, and the appointment of guardians for minors (Supreme Court Act 1981, sched 1, para 1).

[36] [2002] QB 48 at 66 – 68.

[37] [1892] 8 TLR 792, subsequently applied in *Re Good* [1905] 2 Ch 61 and *Re Driffill* [1950] 1 Ch 93. A trust which promoted shooting in combination with 'fishing, cricket, football and polo' was also upheld as charitable in *Re Gray* [1925] Ch 362.

> for the teaching of shooting at moving objects in any manner they may think fit, so as to prevent as far as possible a catastrophe similar to that at Majuba Hill

on the ground that this was in the interests of the defence of the realm.[38] However, in 1993 the Charity Commission considered applications for charitable status from two rifle clubs and concluded that the promotion of

> skill in shooting by providing instruction and practice in the use of firearms to Her Majesty's subjects so that they will be better fitted to serve their country … in times of peril

was not a charitable purpose.[39] The main reason for this[40] was that there had been a shift in social circumstances in the hundred years since *Re Stephens* was decided and it was now considered 'anachronistic' to suggest that rifle clubs tended towards national security.[41] If the courts had sole responsibility for regulation – i.e. if the Charity Commission did not exist – and the High Court had been faced with this issue, then the result would have been less than satisfactory: precedent would require that all rifle clubs be refused charitable status in the future,[42] but all those clubs already on the register of charities would be unaffected. As it was, over the course of the next five years the Commission was able to negotiate the voluntary deregistration of those gun

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[38] The reference to the Battle of Majuba Hill, South Africa (27 February 1881) is significant here as the Boers defeated the British by virtue of their superior fire tactics; thus there is a close analogy with the 'setting out of soldiers' in the Preamble to Statute of Charitable Uses 1601.

[39] (1993) 1 *Decisions of the Charity Commissioners* 4. This was the stated purpose of the City of London Rifle Club; the purpose of the other applicant, the Burnley Rifle Club, was not given but was described 'almost identical' (at 4).

[40] The alternative ratio was that *Re Stephens* could be distinguished on the ground that the bequest in the earlier case was limited to instruction in the specific weapons used by the Armed Forces at that time; there was no such restriction on the objects of the two rifle clubs in the instant case (above n 39 at 9).

[41] Above n 39 at 10.

[42] At the very least until another shift in social circumstances required otherwise.

clubs on the register that were not otherwise charitable,[43] and thus policy was applied uniformly across the sector.[44]

D. REGULATION BY THE EXECUTIVE

Given the limitations of the legislature and the courts as regulatory bodies, regulation by the executive is generally accepted as being the most suitable method of state intervention in a particular market or social sphere. Being a smaller body, the executive is more institutionally efficient than the legislature,[45] and is in a better position to take policy considerations into account than the judicature. Further, the executive has a wider range of tools at its disposal with regard to enforcement compared with the other branches of government. Whereas the legislature and the courts are both concerned essentially with either the setting or interpretation of legal rules, the executive is also in a position to utilise 'education, advice, persuasion and negotiation' in pursuit of its regulatory objectives.[46]

(1) Regulatory Agency

Although the executive can take a broader range of policy issues into account, and has at its disposal a broader range of regulatory tools than the legislature or the courts, it still suffers from certain limitations as a regulatory body. In particular, it will typically lack expertise,[47] as it is necessarily concerned with a wide range of governmental matters across all areas of society. Accordingly, regulation by the executive is typically carried out not by the Cabinet or by a Department with multiple functions, but by specialist regulatory agencies that are charged with the sole task of regulation

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[43] The process would appear to have been completed by the publication of the 1999 version of Charity Commission, *RR1: The Review of the Register of Charities* (London, Charity Commission, 1999), Annex B3. This annex does not appear in the amended 2001 version.
[44] Of course, if the decision with regard to the status of the City of London and Burnley rifle clubs had been made by the High Court under the current regulatory regime, there would not be a problem, as the court and the Commission are able to work in tandem. A decision by the High Court to deny these organisations charitable status would not affect the status of charities already on the register, but the Commission could use the decision to justify persuading affected organisations to be voluntarily deregistered in the manner described above.
[45] Baldwin, above n 6 at 62.
[46] Baldwin and Cave, above n 7 at 97. On the range of regulatory tools available to the executive, see generally below Ch 7.
[47] Baldwin, above n 6 at 85; Baldwin and Cave, above n 7 at 69; Ogus, above n 5 at 105.

and which are able to develop expertise.[48] Indeed, this is the model of the Charity Commission and many other regulatory bodies in the UK.[49] Using an executive agency also enables a balance to be struck between (i) insulating regulation from the 'mercurial tempers of political fortune' on the one hand,[50] and (ii) ensuring a degree of policy co-ordination with central government on the other; it also allows for some 'continuity of policy' when the executive is replaced following an election.[51] Furthermore, the smaller size of an agency compared with the executive is likely to enhance institutional efficiency.

Boundaries of a regulatory regime

The institutional efficiency of executive agencies in comparison with other state institutions makes them particularly well-suited to the regulation of organised civil society given the blurred nature of the sector boundaries.[52] On the strength of the analysis in Chapter Five, it will be clear that, although the structural and functional definitions of organised civil society are essential to our understanding of the nature and operation of CSOs, it would be inappropriate to define the scope of any regulatory regime solely by reference to them. For example, if it were provided that rule *x* applied only to those organisations that (i) exhibit some or all of the shared characteristics identified by Salamon and Anheier[53] and (ii) carry out one or more of the eight overlapping social functions discussed above in Chapter Three,[54] it would not always be easy to determine whether the rule applied to any given organisation. We

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[48] Baldwin, above n 6 at 85.

[49] Single remit agencies operating in areas that may affect civil society organisations include Companies House (an executive agency of the Department of Trade and Industry) and the Housing Corporation (an non-departmental public body sponsored by the Office of the Deputy Prime Minister).

[50] Freedman, J., *Crisis and legitimacy: the administrative process and American government* (Cambridge, CUP, 1978) at 60. See also Baldwin and Cave, above n 7 at 70; Prosser, T., *Law and the Regulators* (Oxford, Clarendon, 1997) at 3.

[51] Baldwin and Cave, above n 7 at 70.

[52] See above Ch 5 at 153 - 158.

[53] See Salamon, L., and Anheier, H. (eds), *Defining the nonprofit sector: A cross-national analysis* (Manchester and New York, Manchester University Press, 1997) at 33- 34; 39- 42; also Kendall, J., and Knapp, M., 'A loose and baggy monster: boundaries, definitions and typologies' in Davis Smith, J., Rochester, C., and Hedley, R. (eds.), *An Introduction to the Voluntary Sector* (London and New York, Routledge, 1995) at 85 - 88. See above Ch 2 at 48 - 54.

[54] See generally Ch 3 above.

have already noted that, whilst there will always be paradigm organisations that fall squarely inside or outside organised civil society,[55] there may be a question mark over organisations that operate on the fringes of the sector.[56] This means that it will not always be possible for an organisation to know whether or not it is bound by rule *x*. In addition to, and as a result of, the lack of a clear boundary, which will make it difficult for certain organisations to order their affairs according to whether they are subject to the regulatory regime,[57] defining the scope of regulation in this fashion would inevitably lead to a significant amount of litigation. Accordingly, the interests of sound regulatory practice require that the scope of any regulatory regime is more tightly defined.

However, it is still likely to be difficult to draw a bright line around the CSOs falling within the scope of the regime. There are three possible ways of achieving this: (i) controlling entry to the sector; (ii) drawing up a complete list of regulated organisations; and (iii) defining the sector by reference to conceptually clear criteria. We shall consider each in turn.

Controlling entry to the sector

First, we could ensure clarity by (i) sticking with our relatively imprecise structural and operational definition, but (ii) controlling entry to the sector. The effect of this would be that, whilst an organisation at the edge of the sector might not be able to tell in advance whether it will be officially accepted into the sector, it would always know whether or not it was bound by the rules of the regime at any given point in time. This effectively describes the English position in relation to charitable CSOs, whereby the Charity Commission exercises a 'gate-keeping' function, by deciding whether to enter a CSO on the register of charities upon request.[58] Although the definition of charity is imprecise, as with our structural and functional definition of organised civil society,

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[55] Consider the examples given in Ch 5 of the government department, the bookshop and the reading group (see above Ch 5 at 152).
[56] See above Ch 5 at 169 – 170.
[57] See above Ch 5 at 155 - 158.
[58] See Charity Commission, *Giving Confidence in Charities: Annual Report 2001 – 2002* (London, Charity Commission, 2002) at 10.

there is never any doubt about which organisations are subject to the rules relating to registered charities.[59]

However, this approach is unlikely to be an effective way of regulating organised civil society as a whole, as, in order to be effective, it requires that organisations apply to 'join' the regulated sector. What would happen to those organisations that decide not to apply? Assuming that they satisfy our structural and functional definition, then, for the reasons given in Chapter Four, we would still wish to regulate them, and yet by controlling entry to the sector, we would have excluded them from the scope of our regulatory regime.

Complete list of regulated organisations

The second way of tightening the definition of organised civil society for regulatory purposes is simply to list, in advance, all those organisations that we have decided will be regulated. However, this is also of only limited utility, for, as we have already noted,[60] the topography of the sector and its boundaries are unlikely to remain static over time – accordingly, the list of organisations is unlikely to provide an accurate map of the sector for long.

Conceptually clear criteria

The third option is provide conceptually clear criteria[61] that can be applied to any given organisation in order to determine whether it is subject to regulation, as and when we need to know. The use of criteria is more flexible than a complete list, as it enables us to take account of the fact that some organisations will enter or leave the sector once our regulatory regime is in place. Further, if our criteria are conceptually certain – i.e. we will know for certain whether an organisation meets them or not – then any given organisation will be able to determine whether or not it is subject to the rules of our regime. However, it is clear from the preceding discussion that conceptually certain criteria will not be able to reflect the sector, as defined by

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[59] Of course, the wider picture is not quite that straightforward, as the Commission also has certain regulatory powers in relation to charities which are excepted from regulation, and in respect of which there is no gate-keeping (see Charities Act 1993, s 3(5)(b)).

[60] See above Ch 5 at 154.

[61] By 'conceptually certain' we mean that we can say of any given organisation that it either does or does not satisfy the criteria: we will never answer 'don't know' – cf the structural and functional definition derived from Chs 2 and 3, which is *not* conceptually certain.

structure and function, with complete accuracy. If we draft conceptually certain criteria that account for every organisation that might fall within organised civil society, then it is likely that they will be over-inclusive, and we will find that we have inadvertently included within our regime some organisations that fall the sector. However, if we draft conceptually clear criteria that exclude every organisation that we believe falls outside the sector, then it is likely that our criteria will be under-inclusive and inadvertently exclude some CSOs as well.[62] Problems of this type are particularly likely to occur when a new regulatory regime is introduced, especially where there is a lack of empirical evidence to back up the theories behind regulation, as any criteria will be 'anticipatory' rather than 'reactionary'.[63]

These problems could be mitigated in practice if we provided for the periodic review and, where necessary, revision of the boundaries of our regulatory regime. In the short term, this would enable the development, through trial and error, of a robust working boundary that brings the inevitable problems of over- or under-inclusion to an acceptable level, whilst in the long-term topographic changes to the sector could also be taken into account. A regulatory agency is the body best suited to this task in light of both its institutional efficiency, which will be help to ensure changes can be made with relative ease, and its expertise, which will improve the chances of discovering workable criteria sooner rather than later.

Of course, we must be wary of allowing any institution to define the limits of its own jurisdiction, lest it abuse this power. However, it would be a relatively straightforward matter to limit the scope of the regulatory agency's discretion in this regard – the legislature could lay down a set of broad general principles, based on our structural and functional definition, to which the agency must adhere but which it can develop and elaborate. The regulator could then amend its own rules from time to time with relative ease and without departing from, or requiring a new, legislative mandate. Indeed, rule-making of this kind – where the legislature provides the outline for a

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[62] Indeed, it is clear from our analysis in the second half of Ch 5 that the current regulatory regime in England, under both the current law and the proposed reforms, is under-inclusive. For example, the public benefit requirement operates to exclude private sector organisations from the sector, but also excludes some CSOs based on mutuality. See generally above Ch 5 at 202 - 204.

[63] Black, J., *Rules and Regulators* (Oxford, Clarendon Press, 1997) at 8.

regulatory regime, to be fleshed out by the regulator itself – could be viewed as lying at the heart of modern regulation. In the words of Baldwin and McCrudden:[64]

> As government expands into unfamiliar territory it is often hard to set fixed criteria that will adequately anticipate marginal cases. Sometimes it is simply not possible to foresee what circumstances will arise. In these cases a greater or lesser degree of discretionary power may need to be left to the administrator. … Delegation of rule-making powers may also be needed where constant fine-tuning of the rules and quick changes to meet new circumstances are required. … [T]hese factors … represent advantages of agencies over the traditional central government department.

In fact, this form of rule-making already characterises the relationship between the Charity Commission and the legislature both under the current law and the proposed reforms: we have already noted the imprecise nature of the Commission's existing legislative mandate under s 1(3) of the Charities Act 1993 and the more detailed provisions to inserted into that Act by s 7 of the Charities Bill 2004.[65] Of course, this formula is not without its problems – as evidenced by the criticisms relating to the scope of the Commission's powers and the legitimacy of its review of the register noted by Mitchell[66] – which is one reason why regulation is frequently justified by reference to factors other than a legislative mandate.[67] However, where there is concern that a regulator has acted *ultra vires* and made a rule that is arguably outside the scope of its general mandate, then the availability of judicial review,[68] or, a right of appeal,[69] will go some way to ensuring that the discretion of the regulator does not go unchecked.

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[64] Above n 6 at 5.
[65] See above Ch 1 at 22.
[66] Mitchell, above n 98 at 198.
[67] See above n 7.
[68] It is trite to note that executive agencies are public bodies and, as such, amenable to judicial review (on the meaning of 'public body' for the purposes of judicial review, see above Ch 5 at 163 - 164); the Commission itself was subject to review by the courts in *R* v *Charity Commissioners for England and Wales, ex parte Baldwin* [2001] WTLR 137.
[69] For example, under the current law there is a right of appeal to the High Court from a decision of the Commission regarding an organisation's entry on the register of charities or lack thereof (Charities Act 1993, s 4(3)) and in relation to charity proceedings (Charities Act 1993, s 16(11 – 13)). We have already noted that the Charities Bill provides for the creation of a new appellate body, the Charity Appeals Tribunal, to hear appeals relating to the registration process (Charities Bill 2004, s 8 and Sched 4: see above Ch 1 at 22).

(2) Regulation by an Official

We should note also that it is possible to charge one official, rather than an agency, with the task of regulation. Baldwin and Cave note that this has the advantage of reducing bureaucracy[70] and may also provide an advantage from the perspective of fostering the sector generally, in that the public may have greater confidence in a recognised figure as opposed to a 'vague commission of faceless persons'.[71] However, this must be weighed against the risk that regulation will be influenced by the 'cult of personality'.[72] Further, whereas a regulatory agency is able to provide continuity during changes in government, placing regulation in the hands of one person risks that continuity when that person is replaced.[73] It would appear that nothing in the justifications for regulating organised civil society that we considered in Chapter Four suggests that regulation by a single individual is particularly desirable. Nevertheless, it is prudent to mention this model of regulation for two reasons. First, although the *de facto* regulator of charitable CSOs under the current law is the Charity Commission,[74] it is strictly speaking the five[75] Charity Commissioners who are charged with regulation.[76] However, the *de jure* position will soon represent reality, as the Charities Bill proposes to abolish the office of Charity Commissioner and transfer the 'property, rights and liabilities' to the Commission, which will be formally established as a corporation.[77] Second, the Companies (Audit, Investigations and Community Enterprise) Act 2004 establishes the office of Regulator of Community Interest

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[70] Above n 7 at 71.
[71] Baldwin and Cave, above n 7 at 71.
[72] Baldwin and Cave, above n 7 at 75.
[73] Baldwin and Cave, above n 7 at 75.
[74] For example, the Review of the Register, guidance publications and decisions with regard to charitable status are all published in the name of the Commission, rather than the Commissioners.
[75] Under the Charities Act 1993, Schedule 1 there must be a minimum of three Commissioners in place (para 1(1)) and no more than five (para 1(5)). The Charities Bill, if enacted in its current form, will provide for a minimum of five members of the Commission and a maximum of nine (Charities Act 1993, Sched 1A, para 1(1), inserted by the Charities Bill, Sched 1).
[76] Charities Act 1993, s 1.
[77] Charities Act 1993, s 1A(4) inserted by the Charities Bill 2004, s 6.

Companies,[78] to be held by a single individual[79] charged with the regulation of those CSOs that adopt this corporate form.[80]

E. SUPPLEMENTING REGULATION BY THE EXECUTIVE

(1) The Courts Revisited: Controlling Maladministration

Although we have concluded that an executive agency is the body best suited to regulating organised civil society, it does not follow that the courts can play no part in a regulatory strategy. In fact, there are a number of reasons why the judiciary might still have an important role to play in relation to one particular form of regulation: the control of maladministration.

We have already noted that two interrelated justifications for regulating organised civil society are (i) the general need to promote public confidence in its constituent organisations,[81] and (ii) the need to minimise the adulteration of trust – particularly in relation to CSOs that operate primarily on the basis that they are more trustworthy than their private sector counterparts (i.e. those that engage in the provision of public goods, intangible services, the redistribution of wealth and, to a lesser extent, political action).[82] One way of achieving these aims is to require CSOs to disclose relevant operational information, in order that people can make an informed choice when deciding whether to engage with a particular organisation. However, as we consider in the following chapter,[83] disclosure regulation will be limited in its effectiveness in situations where it is impossible or impractical for donors to judge the accuracy of the information made available to them. Baldwin and Cave suggest that, where this is so, it may be appropriate for a regulator to set operational standards to which regulated bodies must adhere.[84] From the perspective of organised civil society, the most likely threat to a CSO's trustworthiness is when there is some abuse of power on the part of

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[78] Companies (Audit, Investigations and Community Enterprise) Act 2004, s 27(1).
[79] Companies (Audit, Investigations and Community Enterprise) Act 2004, s 27(2).
[80] Companies (Audit, Investigations and Community Enterprise) Act 2004, s 27(3). Draft regulatory provisions (The Community Interest Company Regulations 2005) were laid before Parliament on 11 October 2004. See also Department for Trade and Industry, *Consultation on Draft Regulations for Community Interest Companies* (www.dti.gov.uk, DTI, 2004).
[81] See above Ch 4 at 132 - 137.
[82] *Ibid.*
[83] See below Ch 7 at 243- 244.

its managers.[85] Accordingly, it may be desirable to regulate CSOs in order to prevent maladministration.

There are a number of reasons why the courts would be suited to this task, despite the limitations noted earlier.[86] In particular, the courts (i) can be used when there are no alternative means of controlling abuses of power, (ii) have proven expertise in this area and (iii) encourage civic participation.

Lack of an adequate alternative remedy

The main advantage of review of maladministration by the courts is that it enables there to be a check on abuses of power in situations where there would otherwise be no adequate remedy. If *x* commits a civil wrong, there will normally be someone else, *y*, whose legal right has correspondingly been infringed. It will be up to *y*, rather than anyone else, to pursue the matter: consider the law relating to contracts or private trusts. However, in the context of organised civil society, there are a number of situations where relying on *y* to take action might not be an effective means of ensuring due administration.

First, it is feasible that a CSO might commit an abuse of power but, in doing so, not infringe another's legal right – in other words, there will be no-one to play the part of *y*. In many situations, the people who engage with the sector could keep a CSO in check: donors have an incentive to ensure that their donations are spent in an appropriate manner, whilst beneficiaries have an incentive to ensure that they are being treated in an acceptable fashion. Accordingly, by providing donors and beneficiaries with rights in the due administration of a CSO, much maladministration will be checked. However, there may be situations where there are no identifiable donors or beneficiaries – the former might occur where a CSO is not reliant on donations for funding,[87] whilst the latter might occur in the case of public goods provision. Where this is the case, it is not clear that there is an alternative actor whom we could give an equivalent right to enforce due administration.

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[84] Baldwin and Cave, above n 7 at 50.
[85] See above Ch 3 at 69 - 70 and Ch 4 at 132 - 137.
[86] See above at 210 - 215.
[87] E.g. because it is funded by its own trading activities (see above Ch 5 at 168) or by an endowment fund.

Even where *y*'s rights have been infringed, *y* may be unaware that that the infringement happened. First, we have already noted that much civil society activity requires CSOs to operate in circumstances where it will be impossible, or impractical, for donors to find out how their money is actually spent.[88] Similarly, it may be equally difficult for *y* to find out whether any maladministration has occurred. Furthermore, even if *y* is in a position to investigate a potential abuse of power, it does not follow that it will be in his interest to pursue the matter. Those who donate the loose change in their pockets to a CSO will be unlikely to consider it an effective use of their resources to concern themselves with the organisation's administration, whilst those who benefit from a CSO's activity may have a strong incentive not to bite the hand that feeds them.

With this in mind, what should happen if *z* – a third party who has access to information regarding the administration of a CSO – has reason to believe that maladministration has occurred, but either does not know who *y* is and so cannot inform him, or (ii) cannot persuade *y* to take up the matter? There are two ways of ensuring that abuses of power do not go unchecked in this situation. The most obvious solution is to give our executive agency the power to hear complaints from the general public and then to respond accordingly.[89] A second, more complicated, option would be to give *z*, as well as *y*, the right to enforce the due administration of the CSO.

Using our executive agency to enforce due administration enables policy considerations to be taken into account, utilises the expertise of the agency and enables decisions to be taken as part of a long-term regulatory strategy based on repeated dealings with the wrongdoer organisation.[90] However, every investigation of potential maladministration must either be funded from the public purse[91] or by the sector

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[88] See above Ch 3 at 65 - 68, 88 – 90, 92 - 94.
[89] On the range of responses open to a regulator, see generally below Ch 7.
[90] In other words, the general benefits of using regulatory agencies apply here: on which see above at 215 – 220 and below Ch 7 generally.
[91] See, for example, the 28th Report of the Select Committee on Public Accounts, which, although critical of the Charity Commission's perceived lack of activity in this area, recognised the significant resource implications of this form of regulation (Parliamentary Select Committee on Public Accounts, *Charity Commission: Regulation and Support of Charities* (HC Paper No.408, 1998) paras 51 and 61).

itself.[92] Enforcement by individual legal persons through the courts – i.e. judicial review – necessarily sacrifices agency expertise, and may also, without an integrated regulatory strategy, jeopardise policy considerations and long-term strategy. However, this method has the advantage that once a potential transgression is discovered, the cost of enforcement falls upon the aggrieved individual – if he wishes to resolve the matter he must initiate court proceedings at his own expense. Although, as suggested above,[93] the limitations of the judiciary would suggest that it is unsuitable as a stand-alone means of preventing abuse of power, it is not difficult to conceive of a situation in which it would be advantageous that it be added to the regulatory armoury – typically where *z* brings a complaint to the relevant regulatory body only to be told that lack of resources prevents it from taking action.[94]

Expertise

We noted above that Baldwin and Cave suggest that one of the problems with using the judiciary as a regulatory tool is their lack of expertise.[95] This is true at one level: even taking into account the ways in which this problem can be ameliorated,[96] the jurisdiction of the courts is broad, dealing as they do with the whole spectrum of legal issues, and individual judges (even taking account of specialisation) will regularly deal with problems involving different areas of law and social spheres. Thus there is clearly less likelihood of their developing the same depth of expertise as might be achieved with a sector-specific regulator whose jurisdiction is more narrowly defined. However, the courts are expert in determining whether any given act or omission constitutes a breach of a legal rule; and more specifically, they have developed expertise in determining whether any act or omission is made outside the authority of the organisation or office in question – this is evidenced in the body of private law relating to the powers and duties of company directors, trustees and other fiduciaries and in the body of public law concerned with the due administration of public bodies,

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[92] E.g. by means of fiscal penalties for those organisations that are found guilty of maladministration.

[93] See above at 210 - 215.

[94] There are also wider social advantages in the fact that this may encourage participation in civic life (on which generally see above Ch 3 at 95 - 96). This in turn must be balanced with the need to discourage officious intermeddling, which we consider below Ch 8 at 253 - 254.

[95] Baldwin and Cave, above n 7 at 68.

[96] See above at 213.

judicial review. It may be desirable to utilise this expertise so as to minimise the abuse of power by CSOs.

It must be noted that justifying the review of maladministration by the courts solely on the ground of expertise assumes that abuses of power can be dealt with in isolation from other regulatory matters. Otherwise, we must overcome the problems relating to policy co-ordination discussed above.[97] Whether we think that these problems can be dealt with in isolation depends very much on whether we consider due administration to be an inviolate principle of CSO management.[98] If we do, then it would be unnecessary – indeed, inappropriate – to consider individual cases in a wider context; the opposite is clearly true if we are prepared, in certain circumstances, to trade due administration for other regulatory goals – for example, overlooking an isolated breach of rule *x* in order to secure long-term compliance with rule *y*.

Civic participation

We have already noted that one of the social functions of organised civil society is the facilitation of civic participation. Hence it seems appropriate at this juncture to draw attention to the fact that engaging the courts in the review of CSO maladministration can itself facilitate civic participation at the same time as pursuing other regulatory goals. From a regulatory perspective, encouraging citizens to become involved in 'policing' the sector would assist in reducing the problems of information asymmetry in relation to those CSOs that function as intermediaries between purchasers of services and their users.[99] Of course, this must be balanced with the need to prevent CSOs from being hampered unnecessarily by officious intermeddling, but appropriately drafted rules of standing should be able to minimise this.[100]

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[97] See above at 213 - 215.

[98] Certainly the Charity Commission has attempted to make due administration a prerequisite of charitable status, with little success: see Mitchell, C., 'Reviewing the Register' in Mitchell, C., and Moody, S. (eds.), *Foundations of Charity* (Oxford, Hart, 2000) at 190. See also generally Charity Commission, *The Hallmarks of an Effective Charity* (London, Charity Commission, 2004).

[99] See above Ch 4 at 135 - 137.

[100] See below Ch 8 at 249 - 254.

(2) Self-Regulation

The final form of regulation we must consider is self-regulation, a model that currently has a strong presence in organised civil society with examples at both national[101] and international levels.[102] It is outside the scope of this thesis to consider this model in any detail, as self-regulation covers a wide range of activity ranging from the very formal to the informal,[103] and the label is also used to describe regulatory action taken at the level of individual organisations.[104] At the formal end of the spectrum are organisations such as the Jockey Club and the Football Association, in the private sector, or CSOs such as the Law Society or the Bar Council, which are not only responsible for establishing professional standards but also control entry to the professions in question. Organisations such as the National Council for Voluntary Organisations or the Society of Socio-Legal Scholars, on the other hand, regulate on a less formal basis – their primary purpose is not regulatory but they produce codes of practice to which their members are expected to adhere.[105] In addition, the boundary between state regulation and self-regulation is not a bright line but a gradual shifting from one paradigm to another[106] - for example, Black notes one model whereby the state formulates regulatory policy which is then applied by the self-regulator.[107] Nevertheless, it important to be aware of the potential advantages and disadvantages that self-regulation might have for organised civil society.

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[101] E.g. the National Council for Voluntary Organisations in England (formed in 1964, with sister organisations throughout the rest of the UK); the National Charities Information Bureau and the Charitable Advisory Service of the Council of Better Business Bureaus in the United States and the Better Business Bureaus Wise Giving Alliance in the United States (the former formed in 1984; the latter in 2001, the result of a merger of the National Charities Information Bureau and the Charitable Advisory Service of the Council of Better Business Bureaus); the Charter Committee on Professional Ethics in France (formed in 1989). CSOs may find also themselves regulated by non sector-specific self-regulators: e.g. CSOs that engage in campaigning involving any form of advertising are regulated by the Advertising Standards Authority in the UK (formed in 1962).

[102] E.g. the European Foundation Centre (formed in 1989).

[103] Baldwin and McCrudden, above n 6 at 306; Ogus, above n 5 at 108 - 109.

[104] See Baldwin and Cave, above n 7 at 133 – 136.

[105] See e.g. National Council for Voluntary Organisation, *Good Governance Action Plan Workbook* (London, NCVO, 2004); Society of Socio-Legal Scholars, *First Restatement of Research Ethics* (www.kent.ac.uk/slsa, SLSA, 2005 web version); also Baldwin and Cave, above n 7 at 126.

[106] Baldwin and Cave, above n 7 at 41 and 124.

[107] Black, above n 63 at 50.

Advantages of self-regulation

There are four perceived advantages that self-regulation in general has in comparison with regulation by the state: (i) greater expertise;[108] (ii) greater efficiency;[109] (iii) independence from central government;[110] and (iv) cheaper cost,[111] combined with the fact that this cost is borne by the sector itself as opposed to the state and, ultimately, the taxpayer.[112] From the perspective of civil society regulation, sector-specific expertise is desirable when we consider that the co-ordination of the sector was one of the justifications for regulation that we considered in Chapter Four.[113] We have already noted that, according to Salamon's theory of voluntary failure, the sector is better able than the state to determine social need;[114] it follows that it is also likely to be better able to recognise philanthropic insufficiency and particularism and thus to

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[108] Baldwin and Cave, above n 7 at 40, 64 and 126; Ogus, 'Rethinking Self-Regulation' in Baldwin, R., Scott, C., and Hood, C. (eds.), *A Reader on Regulation* (Oxford, OUP, 1998) at 375. It has also been suggested that, because of the increased expertise in the affairs of the regulated sector, self-regulation is less likely to result in 'over-regulation' and the proliferation of rules leading to juridification (Blundell, J., and Robinson, C., *Regulation Without the State* (London, Institute of Economic Affairs, 1999) at 18 – 21; see also Baldwin and Cave, above n 7 at 40; on juridification, see above Ch 4 at 150) whilst it is certainly true that lack of expertise in the sector will increase the chances of poorly-designed and over-inclusive rules, it would seem highly probable that lack of expertise in rule-making itself – as will likely be the case with a self-regulator, at least when regulation is first implemented – will carry a similar risk.

[109] Advertising Standards Authority, *Self Regulation: Advertising Under Control* (www.asa.org.uk, Advertising Standards Authority, 2001 web version); Baldwin and Cave, above n 7 at 40, 65 and 127; Baldwin and McCrudden, above n 6 at 306; Ogus, above n 5 at 107; Ogus, above n 108 at 375.

[110] Baldwin and McCrudden, above n 6 at 305.

[111] Baldwin and Cave, above n 7 at 40; Ogus, above n 108 at 374;

[112] Baldwin and Cave, above n 7 at 128; Ogus, above n 5 at 107; Ogus, above n 108 at 375; noted specifically in the context of civil society regulation by Tayart de Borms, L., and Faure, E., 'Transparency and Accountability' in Schlüter, A., Then, V., and Walkenhorst, P. (eds.), *Foundations in Europe: Society Management and Law* (London, Directory of Social Change, 2001) at 415. Of course, there may still be some cost to the state: Baldwin and Cave note that the state may need to spend resources approving the rules of the regulator (above n 7 at 40) – e.g., detailed consideration will be necessary if the regulation is of a type that, were it not for satisfactory self-regulation, the state would wish to step in and regulate itself (this being one of the criteria for determining whether a self-regulatory body is classed as 'public' for the purposes of judicial review – on which, see above Ch 5 at 163 - 164); further, the regulator itself may require regulating by the state – e.g. through judicial review (though not every self-regulator will be amenable to judicial review – see above Ch 5 at 163- 164); indeed, several commentators note the comparative lack of accountability of self-regulation when compared with the state alternative: see e.g. Baldwin and Cave, above n 7 at 40; Ogus, above n 108 at 375).

[113] See above Ch 4 at 138 - 140.

[114] See above Ch 3 at 76 - 78.

know when regulation will be appropriate. Furthermore, when a sector is regulated by expert peers, we might expect that the regulated organisations will be more likely to respect, and accordingly adhere to, the regulations.[115] A regulator that is independent from the state is also, in turn, less likely to compromise the independence of CSOs in its attempts to manipulate the sector,[116] although it should be noted that self-regulation is, in itself, no guarantee of autonomy – even in the situation where this is the only form of regulation, as opposed to supplementing state activity, the threat that the state might decide to intervene and take over the task may influence regulatory behaviour.[117]

The 'compact' model of self-regulation

The advantages in detailed the previous paragraph presuppose a form of self-regulation based on what we might term the 'regulator' model – in other words, a system of regulation which consists of a formal body enforcing regulatory rules[118] in relation to those organisations falling under its jurisdiction. However, at this juncture it is perhaps important to acknowledge the significance of an alternative model which might broadly be seen as a form of self-regulation, which we might term the 'compact' model: an agreement between representatives of the state and the regulated sector that sets out in broad terms a set of 'soft' principles or standards that are expected of each. In the context of organised civil society, the four Compacts between the sector and the state in England, Scotland, Wales and Northern Ireland are the most high-profile recent examples of such an arrangement.[119] Agreements of this nature encourage adherence by virtue of the fact that they are based on a perceived 'common interest' and 'shared

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[115] Baldwin and Cave, above n 7 at 40; Ogus, above n 5 at 107; Ogus, above n 108 at 375.
[116] On the significance of independence, see above Ch 2 at 50 - 51 and Ch 4 at 146.
[117] Baldwin and McCrudden, above n 6 at 130.
[118] On the nature of enforcement in the context of self-regulation, see immediately below.
[119] See Home Office, *Getting it Right Together: Compact on Relations between Government and the Voluntary and Community Sector in England* (Cm 4100, 1998); Scottish Executive, *The Scottish Compact: The Principles Underpinning the Relationship Between Government and the Voluntary Sector in Scotland* (Cm 4083, 1998); Secretary of State for Wales, *A Shared Vision: Compact Between the Government and the Voluntary Sector in Wales* (Cm 4107, 1998); Northern Ireland Government's Department for Social Development, *Building Real Partnership: Compact Between the Government and the Voluntary and Community Sector in Northern Ireland* (Cm 4167, 1998). Note also the European Commission, *European Governance: A White Paper COM* (2001) 428 (on which see above Ch 4 n 192; also Armstrong, K., 'Rediscovering Civil Society: The European Union and the White Paper on Governance' (2002) 8 *European Law Journal* 102) at a European level.

aims and values',[120] as opposed to a set of rules imposed by the regulator upon the regulated. The four UK Compacts are particularly significant for our purposes in that they do not adhere to a narrow definition of the sector based on notions of legal charity – rather, they are targeted at the 'voluntary and community sector'.[121] Furthermore, no attempt is made to define this sector. Accordingly, the problems relating to regulatory design which applies to both 'hard' law regulation by government agency and to self-regulation based on the 'regulator' model – namely, the difficulty in achieving an appropriate conceptually certain boundary around the regulated sector[122] – are sidestepped. However, the nature of this model of regulation is such that it falls outside our definition of regulation, in that it does not provide for 'sustained and focused control … by [an] agency'.[123] Accordingly, whilst the rhetoric contained in them is certainly important at a symbolic level, and as such warrants detailed consideration,[124] this is outside the scope of this thesis.

Disadvantages of self-regulation

There are, however, a number of disadvantages with this regulatory model. Despite an increased likelihood that regulated organisations will voluntarily adhere to the regulator's rules, the available sanctions should any organisations fail to do so will be limited compared with those wielded by the state – ultimately, a self-regulator can do nothing greater than terminate an organisation's membership or otherwise withdraw its seal of approval. Whilst the threat of the 'adverse publicity' that might ensue cannot be ignored,[125] this clearly lacks the weight of other sanctions available only to the state, such as the withdrawal of tax exemptions or criminal sanctions.[126] It is for this reason that self-regulation is here considered as a supplement to state regulation as opposed to an alternative. However, we should note that where a regulator controls

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[120] Morison, J., 'The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society' (2000) 27 *Journal of Law and Society* 98 at 125 – 126.
[121] See above n 119.
[122] See above at 216 - 220.
[123] Selznick, P., 'Focusing Organizational Research on Regulation' in Noll, R. (ed.), *Regulatory Policy and the Social Sciences* (Berkley and LA, University of California Press, 1985) at 363. See above Ch 1 at 17.
[124] See further e.g. Morison, above n 120; Kendall, J., *The Voluntary Sector* (London, Routledge, 2003) at 66 – 73 (note also *ibid*, Ch 4 on the lead-up to the Compacts).
[125] Advertising Standards Authority, above n 109 at 3.
[126] On the regulatory tools available to the state, see below Ch 7.

entry into the sector in question,[127] the threat of expulsion will become highly significant, for it will amount, for all practical purposes, to forcing the organisation in question out of business.

A further disadvantage of self-regulation is the increased likelihood of regulatory capture.[128] As a working relationship develops between the regulator and the regulated sector, there is a risk that the regulator may end up exercising its discretion so as to satisfy the regulated organisations – or at least those with the most economic power[129] or the loudest voices – rather than pursuing its official regulatory goals. When a regulator is constituted from representatives of the sector itself, the likelihood of such sector-friendly regulation is clearly increased, particularly as the flipside of the cost of regulation falling on the sector is the fact that the regulator's 'purse strings' are controlled by the very organisations it is trying to keep in order.[130]

From the point of view of civil society regulation, the threat of capture is particularly interesting. Whereas many regulators are concerned primarily with operating in the public interest – consider, for example, the utility regulators in the UK[131] – five of our six specific justifications for regulation (namely, preventing anti-competitive practices,[132] ensuring accountability,[133] co-ordinating the sector,[134] rectifying philanthropic failures[135] and preventing challenges to organisational quiddity),[136] plus the general notion of fostering the sector,[137] are in the interests of organised civil

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[127] See, for example, the bodies detailed above at 227. We have already considered that controlling entry to organised civil society as a whole would not be appropriate (see above at 217 - 218).

[128] See e.g. Baldwin and Cave, above n 7 at 129; Blundell and Robinson, above n 108 at 23 – 24; Charity Commission and Home Office, *Charity Registration: When Should It Be Voluntary?* (www.charity-commission.gov.uk, Charity Commission, 2000 web version), para 26; Ogus, above n 108 at 108.

[129] Baldwin, above n 6 at 36.

[130] Baldwin and Cave, above n 7 at 130.

[131] E.g. Ofcom, the regulator of television, radio and telecommunications providers, states that it 'exists to further the interests of citizen-consumers' (Ofcom, *About Ofcom* (www.ofcom.org.uk, Ofcom, 2005 web version)); Ofgem, the regulator of gas and electricity suppliers, states that its role is 'to protect and advance the interests of consumers' (Ofgem, *Ofgem's Work* (www.ofgem.gov.uk, Ofgem, 2005 web version) under 'Ofgem's role').

[132] See above Ch 4 at 124 - 125.

[133] See above Ch 4 at 132 - 137.

[134] See above Ch 4 at 138 - 140.

[135] See above Ch 4 at 138, 143 - 145.

[136] See above Ch 4 at 145 - 148.

[137] See above Ch 4 at 148 - 149.

society itself. Only the control of campaigning relates directly to the interests of actors outside the sector, being concerned with minimising externalities.[138] Therefore, one might assume, *prima facie*, that even if some form of capture were to occur, the interests of the regulated organisations would be virtually synonymous with the original goals of the regulator, thereby minimising any problems. However, the short- or long-term interests of individual CSOs as perceived by their trustees or members might not coincide with the interests of organised civil society as a whole: for example, it might be in the short-term interests of *x* to engage in anti-competitive practices in order to force local rivals *y* and *z* to disband; this will clearly not be in the wider interests of the sector if it has a negative impact on the overall provision of certain goods or services.

Whether regulatory capture is a problem is open to argument. It presupposes that there is a 'sphere of public regulatory authority which ought to be inviolate from private influence',[139] and whether or not one agrees with this assumption depends upon one's political leanings. Furthermore, it should be noted that the other models of regulation discussed above are not immune from capture, as, in the words, of Freedman:[140]

> Harmony with one's formal adversary is for many regulators a more comfortable and rewarding way of professional life than engaging in perpetual combat.

Equally, it may be possible for a self-regulator to minimise the chance of capture. For example, whilst the Advertising Standards Authority is the organisation responsible for the regulation of the advertising industry, a separate body – the Advertising Standards Board of Finance – is responsible for collecting the subscriptions that fund its endeavours. Some commentators advocate multiple self-regulatory bodies operating in the same industry or social sphere, in order to minimise cartels between regulator and

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[138] Although, as will be apparent from the social functions discussed above (see generally Ch 3), a significant indirect benefit to society as a whole accrues from civil society activity and, hence, from the other justifications for regulation.
[139] Hancher, L., and Moran, M., 'Organising Regulatory Space' in Baldwin *et al*, above n 108 at 150.
[140] Freedman, J., *Crisis and legitimacy: the administrative process and American government* (Cambridge, CUP, 1978) at 59.

regulated,[141] which may arise where the regulator is captured by a small group of regulated organisations (again, most likely those with the greatest resources or loudest voices). However, this may have ramifications for the sector's public support, as a surfeit of regulatory bodies is likely to leave those interested in interacting with a CSO with 'no clear idea for where to look' for information regarding its credibility.[142]

A further problem particular to organised civil society that we might briefly note is that, just as the blurred nature of the sector's boundaries will make it difficult to determine the reach of a regulatory regime,[143] so too do they make it difficult to decide which types of organisations are eligible to contribute to any given self-regulatory model.

F. CONCLUSION

In this chapter we have argued that, despite a number of limitations, a dedicated executive agency is likely to prove the best practical choice of regulator for organised civil society, just as it is with many other sectors. However, we have also noted that there are strong grounds for exploiting the judiciary's expertise in controlling abuses of power, as well as for utilising some form of self-regulation in order to improve the effectiveness of any attempt to co-ordinate the sector. Accordingly, these different models 'should be seen not as antithetical but complementary', and it seems likely that all three will have some function within a sophisticated regulatory regime.[144]

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[141] See Ogus, above n 108 at 108 – 110; also Stephen, F., and Love, J., 'Regulation of Legal Profession' in Bouckaert, B., and de Geest, G. (eds.), *Encyclopedia of Law and Economics* (Cheltenham, Edward Elgar, 1999), para 3. See also above Ch 4 n 51 and associated text.
[142] Charity Commission and Home Office, above n 128, para 31.
[143] See above at 216 - 220.
[144] Black, above n 63 at 50 (in the context of self-regulation). See also Voluntary Sector Roundtable Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (www.vsr-trsb.net, Voluntary Sector Roundtable, 1999) at 41.

CHAPTER 7

Regulation by the Executive

A. INTRODUCTION

Having considered in the previous chapter the range of bodies that might be suitable regulators of organised civil society, we can now examine the range of weapons available to our regulator of choice – the executive agency – and assess their relevance in light of the reasons for regulating the sector detailed in Chapter Four. Baldwin and Cave identify five paradigm forms that regulation by the executive can take: (i) command and control regulation, (ii) incentive-based regulation, (iii) disclosure requirements, (iv) public ownership and (v) the creation of rights and corresponding liabilities.[1] To these we can add (vi) regulation by means of education and advice.[2]

As Breyer notes, 'different rationales [for regulation] may suggest different remedies',[3] and so we would expect that certain problems that affect CSOs, and which *prima facie* require regulation, will be better tackled by some strategies over others. Specifically, in this chapter we shall argue that the prevention of anti-competitive practices, the control of campaigning and the prevention of challenges to organisational quiddity lend themselves to regulation by way of command and control, whilst regulation to enable sector co-ordination (and with it the rectification of philanthropic insufficiency and particularism) suggests that some form of incentive-based regulation might be appropriate. We will also discuss the limitations of disclosure regulation in ensuring the trustworthiness of the sector.

B. COMMAND AND CONTROL

Command and control regulation – the idea of (i) laying down standards to which regulated organisations must adhere, coupled with (ii) sanctions as a means of enforcement – is perhaps the regulatory strategy most familiar to charity lawyers, as this forms the basis of the law regarding trustee duties: standards of care relating to

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[1] Baldwin, R., and Cave, M., *Understanding Regulation Theory, Strategy, and Practice* (Oxford, OUP, 1999) at 34 – 62.
[2] Noted above Ch 6 at 215. See also Baldwin and Cave, above n 1 at 97.
[3] Breyer, S., 'Typical Justifications for Regulation' in Baldwin, R., Scott, C., and Hood, C. (eds.), *A Reader on Regulation* (Oxford, OUP, 1998) at 81).

managerial activities such as investment, delegation and remuneration, as well as the fiduciary duty of loyalty, are laid down by the relevant authorities (in this case, a combination of the courts and the legislature)[4] and if a charity trustee acts in breach of these standards he suffers the penalty of being held to account for any unauthorised profit or loss caused to the charity. The great advantage of this form of regulation, aside from its familiarity, is the 'immediacy' with which it can take effect[5] – the only limitation is the speed at which a regulator is able to put out rules;[6] this is particularly apparent in comparison with incentive-based regulation.[7] Furthermore, the regulator can be given a discretion to apply a wide range of sanctions depending on the seriousness of the rule breaking in any given situation – at one end of the scale, formal sanctions such as fiscal penalties or criminal liability may act as a strong deterrent against breaching those rules that the regulator regards as inviolable, whilst, in other situations, it may be more efficacious to employ softer tactics such as 'persuasion and negotiation' in order to secure compliance.[8] Indeed, the fact that the regulator will typically have a continuing relationship with the organisations under its jurisdiction may mean that in some circumstances it will be desirable to withhold sanctions altogether – for example, by agreeing not to penalise the breach of rule *x* the regulator might secure compliance with rule *y*. Baldwin notes that laying down general standards may also help to ensure that like cases are treated alike,[9] although the extent to which this is true in practice will obviously depend on the consistency with which sanctions are applied by the regulator.[10] This may in turn be influenced by the range of sanctions.

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[4] See e.g. the Trustee Act 2000.
[5] Baldwin and Cave, above n 1 at 35.
[6] A regulator may be empowered to give its rules retrospective effect, in which case, the desired effect of a piece of regulation may be such that, if a rule is retrospective, the speed with which it is issued may be inconsequential: for example, regulation designed to make organisations liable for their externalities by providing compensation for those affected (on externalities generally, see above Ch 4 at 127 - 131). However where the sanction for rule-breaking is intended as an admonition to discourage rule-breaking in the first instance, speed may be an important factor; although it is of course desirable that 'knee-jerk' measures are avoided.
[7] Baldwin and Cave, above n 1 at 35. On incentives, see below at 238 - 243.
[8] Baldwin and Cave, above n 1 at 97.
[9] Baldwin, R., *Rules and Government* (Oxford, Clarendon Press, 1995) at 13.
[10] See Black, J., *Rules and Regulators* (Oxford, Clarendon Press, 1997) at 9 ('flexible application at the "site-level"').

There are two main disadvantages with command and control regulation. First, wherever a regulator has discretion to make or apply rules, there will be a danger that it will be 'captured' by the sector, a phenomenon we noted in the previous chapter.[11] The second problem with command and control regulation is that it is dependent on sound rule-making. It is outside the scope of this thesis to consider the nature of different rule types in any detail,[12] although we have already noted the need to ensure that rules are proportionate and targeted,[13] and the concerns relating to over- or under-inclusion noted earlier in the context of the scope of a regulator's jurisdiction[14] have equal relevance to the design of individual rules.

(1) Prohibitory versus Compulsory Commands

It would seem that, *prima facie*, command and control regulation would be better suited to those regulatory goals that require CSOs to refrain from certain activities rather than those that require CSOs to perform certain activities. The effect of the phenomenon of juridification, as noted above,[15] is that formal rules may have detrimental effects on the sector where they require organisations to carry out activities that, in an ideal world, they would be doing naturally and of their own volition. In the words of Knapp, Robertson and Thomason,[16] too many rules of this kind are 'anathema to the concepts of volunteerism and mutual aid'. However, this level of artificiality is not present where a rule *prevents* a particular activity – in other words, is prohibitory rather than compulsory. Here, the rule-maker is not required to determine exactly how something should be done: rather, he simply needs to declare that something should *not* be done.

Prohibitory command and control regulation would seem suited to (i) preventing anti-competitive practices,[17] (ii) controlling campaigning[18] and (iii) maintaining

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[11] See above Ch 6 at 231 - 233.
[12] On which see generally Baldwin, above n 9; Black, above n 10.
[13] See above Ch 5 at 155 - 158.
[14] See above Ch 6 at 216 - 220.
[15] See above Ch 4 at 150.
[16] Knapp, M., Robertson, E., and Thomason, C., 'Public Money, Voluntary Action: Whose Welfare?' in Anheier, H., and Seibel, W. (eds.), *The Third Sector Comparative Studies of Nonprofit Organisations* (Berlin and New York, Walter de Gruyter, 1990) at 211.
[17] See above Ch 4 at 124 - 125.
[18] See above Ch 4 at 129 - 131.

organisational quiddity,[19] as these regulatory goals are likely to require that certain activities are prohibited. In relation to the first of these, for example, regulation might simply require that CSOs must not engage in anti-competitive practices and perhaps expand on this by providing a list of prohibited activities. In relation to the second, an unsophisticated attempt at regulation might require, as does the current law in England in relation to charities,[20] that CSOs must not promote political purposes, although, as we have already noted, the benefits inherent in political purposes mean that such a blanket approach is unlikely to be desirable.[21] In relation to the third, regulation might provide that CSOs must not formally affiliate themselves with organisations outside the sector.[22] This kind of rulemaking may also play a part in relation to (iv) ensuring the trustworthiness of the sector, if we consider it desirable to require more than accountability in the purest sense[23] and require that organisations do not abuse their position in situations of information asymmetry – for example, by requiring that the trustees of CSOs do not make an unauthorised profit from their office.[24]

By comparison, command and control regulation might not be our first choice of strategy in respect of sector co-ordination and the rectification of philanthropic failure,[25] as the nature of problems such as insufficiency and particularism is such that they will require some positive action and, hence, a rule that carries with it a positive obligation. For example, responding to philanthropic particularism by requiring CSOs to provide services to wider demographic or geographic areas,[26] or requiring CSOs that provide a service with cyclical demand to maintain their activities during troughs as well as peaks,[27] would effectively compel affected CSOs to act in a particular way. Compulsory command and control regulation such as this exposes the sector to the risk

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[19] See above Ch 4 at 145 - 148.
[20] See above Ch 5 at 196.
[21] An alternative approach which also utilises command and control regulation to prevent an activity would be the rule relating to the political activities of charities, which requires that an organisation does not perform such activities except insofar as they are ancillary to, and in support of, non-political charitable purposes (see Charity Commission, *CC9: Political Activities and Campaigning by Charities* (London, Charity Commission, 2004), para 23).
[22] Consider, for example, the rule preventing charities from supporting a political party – see Charity Commission, above n 21, para 41.
[23] See further below at 244.
[24] See e.g. *Boardman* v *Phipps* [1967] 2 AC 46.
[25] See above Ch 4 at 138 - 140.
[26] *Ibid.*

of juridification, and a more fitting solution in these kinds of situation might be to employ incentive-based regulation to reward appropriate behaviour.[28] This is not to suggest either (i) that command and control regulation could not be utilised in pursuit of these regulatory goals or that (ii) the four goals in the previous paragraphs can be achieved solely by reference to command and control regulation that restrains behaviour, rather than regulation that makes certain acts compulsory. However, a regulator must be aware of the risks that positive obligations carry.

C. INCENTIVE-BASED REGULATION

As an alternative to penalising those organisations that fail to adhere to certain standards, a regulatory regime instead may try to manipulate the behaviour of regulated organisations by rewarding those that do comply with a particular rule. Two forms of incentive-based regulation are of particular interest to the regulation of organised civil society – (i) tax incentives and (ii) regulation by contract or grant. We shall consider each in turn.

(1) Tax Relief

The quintessential form of incentive-based regulation is rewarding organisations with tax relief in return for performing positive obligations or refraining from particular activities.[29] This is particularly useful in situations where it is undesirable, for the reasons discussed above,[30] to give rule-making discretion to a regulatory body. Under incentive-based regulation, there is less scope for harmful unintended consequences: the worst that can happen as a result of over-inclusive tax relief is that an unintended organisation receives a windfall, and the worst that can happen as a result of under-inclusion is that an organisation fails to be rewarded.[31] This form of incentive-based regulation is therefore likely to be particularly useful from the perspective of CSOs, in

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[27] *Ibid.*
[28] See the following paragraph onwards.
[29] Baldwin and Cave, above n 1 at 42.
[30] See above at 235, 236 - 238.
[31] Of course, this may have serious consequences, both from the perspective of the organisation in question, which might be relying upon anticipated relief as part of its financial planning and from a regulatory perspective, in that there is no incentive for a relevant organisation to carry out (or, where appropriate, refrain from carrying out) the act upon which relief is predicated.

that it provides the state with a means of directing the range of activities pursued by the sector, and may therefore enable the state to remedy certain instances of philanthropic insufficiency or particularism. For example, let us assume that, in a particular social sphere, CSOs that carry out activity *x* attract more funding than those that carry out activity *y*, and that the state regards *x* and *y* as being of equal importance and so wishes to redress the balance so that more CSOs engage in the performance of activity *y*. It is clear that neither positive nor negative command and control regulation would be an appropriate means of achieving this goal. Requiring certain CSOs to engage in activity *y* would compromise the sector's volunteerism, whilst preventing certain CSOs from engaging in activity *x*, in the hope that they turn their attention to activity *y* would probably be viewed as stifling the entrepreneurial nature of the sector,[32] whilst at the same time offering no real guarantee that the CSOs in question would turn to activity *x* as opposed to activity *z*.

If, instead, the state provided that those organisations that engage in activity *y* are eligible for tax relief, organisations would have a strong incentive to pursue this over *x*. Moreover, unlike the command and control examples, this would not compromise the sector's voluntary nature as organisations would still have a free choice over their activities, and it would not impact negatively on the autonomy of individual organisations, thereby leaving 'managers free to manage'.[33] Therefore it seems to be a suitable method of co-ordinating the sector so as to minimise philanthropic insufficiency and philanthropic particularism without posing a threat to the sector's organisational quiddity. However, one disadvantage of using this form of incentive-based regulation is that, unlike command and control regulation, the effects will not be instant,[34] as it will take time for existing organisations to shift the focus of their activities,[35] or for new organisations to be established. Accordingly, this is a method of regulation best suited to long-term regulatory goals, and is unlikely to be an

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[32] See above Ch 3 at 108 - 111.
[33] Baldwin and Cave, above n 1 at 42.
[34] See Baldwin and Cave, above n 1 at 43.
[35] The timescale will depend in part on the institutional efficiency of individual CSOs: we have already noted that smaller organisations are generally better able to change direction quickly (see above Ch 3 at 73 - 74); further, the organisational type may affect the ease with which such changes can be effected (we have already noted some of the technical difficulties in changing an organisation's purpose in the context of shifting sector: see above Ch 5 at 159 - 162).

effective way of remedying an unanticipated short-term dip in service provision.[36] We should also note that, although they give little discretion to the regulator, rules concerning tax exemption are typically complex[37] and so there may be unintended compliance costs for CSOs – for example, extra resources may need to be spent by organisations on tax returns and auditing.[38]

(2) Regulation by Contract

A more controversial form of incentive-based regulation is regulation by contract, whereby the state encourages organisations to favour certain activities by offering contracts of service provision, or grants,[39] to those CSOs prepared to carry them out. Much has already been written on the general advantages and disadvantages, particularly the latter, of the 'contract culture' that has come to characterise the relationship between many CSOs and the state in recent years,[40] and it would be inappropriate to discuss these in any detail at this juncture. However, there are a number of things we can say in relation to the contract as a regulatory tool. First, much of the criticism levelled at the contract culture relates to what Taylor and Lewis refer to as 'goal distortion':[41] the fact that CSOs may be tempted to alter their purposes, [42] or the focus of their activities,[43] in order to secure funding. Indeed, the

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[36] Indeed, we have already noted that short-term dips would best be dealt with by allowing CSOs to maintain reserve funds: see above Ch 4 at 139 - 140.

[37] See Baldwin and Cave, above n 1 at 43.

[38] The significance of the cost of compliance in regulatory design has been recognised in numerous official publications: see, e.g. Cabinet Office Better Regulation Task Force, *Principles of Good Regulation* (London, Better Regulation Task Force, 2003) at 4; Cabinet Office Regulatory Impact Unit, *Better Policy Making: A Guide to Regulatory Impact Assessment* (www.cabinet-office.gov.uk, Cabinet Office, 2003) at 18 – 20.

[39] Much has been written on the blurred distinction between contracts and grants in the context of state funding of CSOs (see e.g. Morris, D., *Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict* (Liverpool, University of Liverpool Charity Law Unit, 1999) at 14). For regulatory purposes, the key distinction is the nature of the sanctions available – with both arrangements, probably the most significant sanction for sub-standard performance is non-renewal; however, if the performance or lack thereof amounted to breach of a contract then the contracting authority would be able to sue the CSO for damages, whereas there would be no similar recourse under a grant.

[40] See above Ch 2 n 73 and associated text.

[41] Taylor, M., and Lewis, J., 'Contracting: What does it do to voluntary and non-profit organisations?' in 6 and Kendall, above n 40 at 34.

[42] Leat, D., 'Funding matters' in Davis Smith, J, Rochester, C., and Hedley, R. (eds.), *An Introduction to the Voluntary Sector* (London and New York, Routledge, 1995) at 171 – 172; Morris, D., *Charities and the Contract Culture: Partners or Contractors? Law and Practice in*

Charity Commission itself disapproves of this and its practice is to withhold consent to a change in purpose if (i) the only reason for doing so is to secure funding and (ii) the change takes the organisation 'some way outside' its current purposes.[44] Whilst it is certainly possible that this might have negative consequences – Morris notes that trustees might act outside their powers in order to secure a contract and thus fall foul of the law[45] – from a regulatory perspective goal distortion is, in fact, the very reason for entering into such contracts. As with the fiscal benefits of tax relief, the state is able to co-ordinate the sector and counter perceived philanthropic insufficiency and particularism by luring CSOs towards areas of particular need with the temptation of funding. Service contracts may also be used as a response to philanthropic amateurism,[46] as, unlike the promise of tax relief, an individual contract can 'pertain to inputs, rather than outputs' and make detailed provision for the standards or methods of delivery.[47] Furthermore, the tendering process will require CSOs to demonstrate that they are the most attractive service providers if they are to secure contracts, which is also likely to encourage professionalization.[48]

Conflict (Liverpool, University of Liverpool Charity Law Unit, 1999) at 27; see also Voluntary Sector Roundtable Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (www.vsr-trsb.net, Voluntary Sector Roundtable, 1999) at 14.

[43] Morris, D., 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities' in Dunn, A. (ed.), *The Voluntary Sector, the State and the Law* (Oxford, Hart, 2000) at 128; Taylor and Lewis, above n 43 at 34.

[44] Charity Commission, *CC37: Charities and Contracts* (www.charity-commission.gov.uk, Charity Commission, 2003), para 18. In many cases, it is true that the Commission's permission is required to effect a change in purpose (see Charity Commission, *CC36: Amending Charities' Governing Documents: Orders and Schemes* (London, Charity Commission, 2004), para 16; also Charities Act 1993, s 13). However, this is not always the case (e.g. where a charitable trust gives its trustees an express power to amend its purposes and does not restrict this by requiring that the permission of the Commission is sought first), something that is not made explicit in the Commission's guidance on contracting.

[45] Morris, above n 43 at 129.

[46] See above Ch 3 at 81.

[47] James, E., 'Economic Theories of the Nonprofit Sector: A Comparative Perspective' in Anheier and Seibel, above n 16 at 25.

[48] See Lewis, J., 'What Does Contracting do to Voluntary Agencies?' in Billis, D., and Harris, M. (eds.), *Voluntary Agencies Challenges of Organisation and Management* (Basingstoke and London, MacMillan, 1996) at 104; Robinson, M., 'Privatising the Voluntary Sector: NGOs as Public Service Contractors' in Hulme, D., and Edwards, M., (eds.), *NGOs, States and Donors: Too Close for Comfort* (Basingstoke and London, MacMillan, 1997) at 63; Taylor and Lewis, above n 41 at 33.

However, regulation by contract has a number of serious weaknesses that render it a largely unsuitable form of regulation in the context of organised civil society. First, unless a single authority is charged with the responsibility of negotiating and entering into all contracts with CSOs, there will be a lack of regulatory co-ordination across the sector. At present a large number of state institutions, ranging from local authorities to central government departments, have the power to enter into contracts with CSOs. Under this system, individual contracts would, at best, tend towards only the regulatory goals of the individual contracting bodies; at worst, regulatory aims would either be 'incidental to the main purpose' of service provision,[49] or would fall by the wayside entirely. This problem is exacerbated by the fact that the state is not, of course, the only sector to contract with organised civil society[50] - every private firm that enters into a service arrangement with a CSO in effect becomes a regulatory body. These may, in turn, require regulating by the state in order to ensure a degree of co-ordination and prevent abuses of power.[51]

Second, and perhaps most important from the perspective of civil society regulation, is the fact that, unlike tax relief, which rewards a particular action (i) without specifying which organisations must carry it out and (ii) without prescribing the means by which it must be carried out, regulation by contract enables the state to influence the internal management of individual CSOs directly, thus posing a serious threat to the independence of the sector.[52] This will in turn have ramifications for organisational quiddity[53] and the ability of CSOs to fulfil any political functions which they might

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[49] Baldwin and Cave, above n 1 at 46.
[50] See above Ch 5 at 167.
[51] Leat, above n 42 at 174 – 177.
[52] See e.g. Clark, J., 'The State, Popular Participation and the Voluntary Sector' in Hulme and Edwards, above n 48 at 56; Leat, above n 42 at 172 – 174; McGown Jnr, J., 'Major Charitable Gifts – How Much Control Can Donors Keep and Charities Give Up? [1999] *Journal of Taxation* 279 at 279; Morris, above n 43 at 128; Morris, above n 42 at iv; Salamon, L., *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State* (Baltimore, Johns Hopkins University Press, 1995) at 103 – 105. The National Council for Voluntary Organisations notes that it is possible to provide for rules to ensure that the independence of individual organisations is not compromised, such as the fiduciary duties of loyalty that bind the trustees and directors of charities (National Council for Voluntary Organisations Charity Law Reform Advisory Group, *For the public benefit?* (London, NCVO, 2001), para 2.2.3).
[53] See above Ch 4 at 146.

have.[54] Third, with regard to the use of contracting as a response to philanthropic amateurism, we have already noted the fact that any attempt to regulate so as to counter this phenomenon jeopardises the voluntary nature of the sector.[55]

Finally, we might also note that the nature of the contract culture is such that there will frequently be a number of compliance costs for CSOs that we must be careful not to overlook – for example, the costs of tendering[56] and of obtaining legal advice prior to entering into a contract.[57]

D. DISCLOSURE REQUIREMENTS

Regulating so as to require CSOs to disclose certain data about their activities – for example, annual accounts, details of products or services provided and of those responsible for the organisation, such as the trustees – is the paradigm method of tackling the information asymmetry that is inherent in CSO provision of (i) public goods, (ii) complex private services and (iii) the redistribution of wealth.[58] This form of regulation works by providing those parties interested in participating in the sector with sufficient information to make a rational choice about the organisations that they will patronise. It is significant from the perspective of organised civil society that disclosure requirements, in contrast to proscriptive rules requiring adherence to a particular standard, do not have a negative impact on the independence of the sector.[59] Under this form of regulation, organisations are free to act as they please on the condition that they inform people exactly what they are doing. Disclosure regulation has a long heritage in the charitable sector – in England, the Charity Commission's

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[54] See above Ch 3 at 92 - 96; also Morris, above n 43 at 134 – 135.
[55] See above Ch 4 at 147 - 148; see also Leat, above n 42 at 166 & 173, who notes the risk of 'coercive isomorphism', whereby a CSO adopts the administrative practices of the funding body (at 173); also Powell, W., and Friedkin, R., 'Organizational Change in Nonprofit Organizations' in Powell, W. (ed.), *The Nonprofit Sector A Research Handbook* (New Haven and London, Yale University Press, 1987) at 182; Taylor and Lewis, above n 41 at 32; Salamon, L., 'Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations' in Powell (*ibid*) at 114 - 115.
[56] Leat, above n 42 at 168;
[57] Morris, D., 'Charities in the contract culture: survival of the largest?' (2000) 20 LS 409 at 420.
[58] See above Ch 4 at 132 - 137.
[59] Baldwin and Cave, above n 1 at 49.

register of charities[60] provides free access, either in person or via the Commission's website, to details such as an organisation's stated objects, the names of its trustees and an overview of its recent financial history; all charities must also keep accounts, to be made available to the public upon request.[61]

However, disclosure regulation has a number of limitations. Whilst it should, in theory, remove any information asymmetry between CSO and donor, this depends upon donors having the time and inclination to make use of the information available to them.[62] It is not clear that this will always be the case – for example, whereas a corporate donor considering making a sizeable charitable donation will have a clear incentive, and ready resources, to seek out relevant information about the recipient, the average citizen, when proffered a collecting tin by a volunteer in the street, is less likely to consider it a worthwhile endeavour to check an organisation's credentials before handing over a few pennies. Furthermore, disclosure regulation will be effective only when the information provided by a CSO is accurate: a corrupt or ill-managed organisation will have strong incentive either (i) to withhold relevant information or (ii) to provide false information. The former problem can be discouraged with relative ease by using adverse publicity and 'naming and shaming' guilty organisations.[63] So, for example, in 2004 the Charity Commission published a list of all charities that failed to submit their annual accounts on time.[64] However, the latter problem may go unchecked in the absence of an investigation into a corrupt CSO. It is for this reason that we suggested earlier that some form of judicial control of maladministration may also be desirable if we are to ensure the sector's trustworthiness.[65]

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[60] The Commission is required to maintain a register 'in such manner' as it sees fit (Charities Act 1993, s 3(1))).
[61] Charity Commission, *CC61: Charity Accounts: The Framework* (London, HMSO, 2002), para 10.
[62] Baldwin and Cave, above n 1 at 49.
[63] Baldwin and Cave, above n 1 at 49.
[64] Charity Commission, *Enforcing Submission of Annual Returns and Accounts* (www.charity-commission.gov.uk/investigations/enforce.asp, Charity Commission, 2005 web version).
[65] See above Ch 4 at 137; Ch 6 at 222 - 223.

E. PUBLIC OWNERSHIP

Baldwin and Cave note that regulation can be achieved by nationalising the industry or sphere in question.[66] This will clearly not be an appropriate response to civil society regulation, as it would compromise the independence of the sector[67] and, as a result, jeopardise those social functions that rely on this structural characteristic, namely (i) the provision of public goods,[68] (ii) the redistribution of wealth,[69] (iii) the facilitation of political action,[70] (iv) the facilitation of self-determination[71] and (v) the facilitation of entrepreneurship.[72]

F. RIGHTS AND LIABILITIES

The final[73] regulatory strategy noted by Baldwin and Cave consists of providing those who deal with the regulated industry or sphere with various rights against the organisations with whom they deal.[74] We have already considered the role that such rights can play in the context of checking maladministration in the previous chapter,[75] and we shall return to consider the form that these rights might take in Chapter Eight.

G. EDUCATION AND ADVICE

From the perspective of civil society regulation, the ability to employ education programmes will be particularly useful; indeed we have already considered two justifications for regulation where this would be an appropriate strategy. First, we have noted the problem of philanthropic paternalism in the context of those CSOs that facilitate the redistribution of wealth,[76] whereby those who benefit from a CSO's

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[66] Baldwin and Cave, above n 1 at 50; also Breyer, S., *Regulation and its Reform* (Cambridge, Massachusetts, Harvard University Press, 1982) at 18.
[67] See above Ch 2 at 50 - 51.
[68] See above Ch 3 at 61 - 88.
[69] See above Ch 3 at 89 - 90.
[70] See above Ch 3 at 91 - 96.
[71] See above Ch 3 at 98 - 105.
[72] See above Ch 3 at 105 - 111.
[73] In fact, Baldwin and Cave suggest a further strategy, based upon a model requiring organisations to provide compensation for sub-standard performance (above n 1 at 53 – 55); however, by their own admission this is simply a form of command and control regulation (*ibid* at 55) and so we shall not consider it separately here.
[74] Baldwin and Cave, above n 1 at 51 – 53.
[75] See above Ch 6 at 222 - 226.
[76] See above Ch 3 at 80.

activities feel stigmatised or debilitated by virtue of their reliance on the altruism of others. Campaigning by a regulator so as to changes attitudes towards charity and philanthropy is one way in which this problem could be alleviated without interfering in the sector itself, although we might question whether this can strictly be considered 'regulation' in any meaningful sense.[77] Second, we also have noted that regulation is frequently justified by reference to the general aim of fostering the sector.[78] The use of 'soft' tools such as education and the giving of advice may be viewed as an acceptable means of achieving this, particularly as active intervention in the sector on this general ground alone is difficult to justify objectively, i.e. without reference to one's political preferences.[79] This tactic is one that is frequently employed by the Charity Commission – for example, in pursuit of its statutory function of 'promoting the effective use of charitable resources',[80] the Commission maintains a list of publications intended to provide guidance and support in relation to 'best practice, the duties of charity trustees and charity law'.[81] A number of sources have expressed concern that that such advice or guidance may conflict with a regulator's more traditional 'regulatory' functions – for example, the Commission has been criticised in the past for failing to adequately distinguish between (i) telling charities that certain conduct is required of them as a matter of law, and (ii) advising charities that certain conduct constitutes suggested good practice.[82] The current reform package, recognising the 'tensions that have sometimes arisen out of this "dual role" of regulator and advisor',[83] concluded that the Commission should retain its advisory role over charitable CSOs,[84]

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[77] See above Ch 4 at 143 - 144. Note also our working definition of regulation in Ch 1 at 17.
[78] See above Ch 4 at 148 - 149.
[79] See above Ch 4 at 149.
[80] Charities Act 1993, s 1(3).
[81] Charity Commission, *CC1: Charity Commission Publications* (London, Charity Commission, 2004) at 1.
[82] See Mitchell, C., 'Reviewing the Register' in Mitchell, C., and Moody, S. (eds.), *Foundations of Charity* (Oxford, Hart, 2000) at 190.
[83] Prime Minister's Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (London, HMSO, 2002), para 7.47; note also the House of Lords and House of Commons Joint Committee on the Draft Charities Bill, *Draft Charities Bill Volume 1: Report, Formal Minutes and Evidence* (HL Paper 167-i, HC 660-i, London, HMSO, 2004), paras 193 – 207.
[84] Joint Committee on the Charities Bill, above n 83, para 207; Home Office, *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill Session 2003 – 2004* (Cm 6440, London, HMSO, 2004), para 20.

but that it should take steps to ensure that the distinction between 'advice and instructions' is made clear in all communications.[85]

H. CONCLUSION

It is clear from the preceding analysis that it will not be appropriate to rely on one single strategy when regulating organised civil society. Rather, these are tools that must be used in combination in order to manipulate the sector so as to achieve the objectives detailed in Chapter Four. Specifically, the prevention of anti-competitive practices, the control of campaigning and the prevention of challenges to organisational quiddity lend themselves to regulation by way of command and control, whereas regulation to enable sector co-ordination (and with it the rectification of philanthropic insufficiency and particularism) suggests that some form of incentive-based regulation might be appropriate. Finally, although disclosure regulation will go some way towards ensuring the trustworthiness of the sector, some form of control over CSO maladministration will be necessary in order to minimise abuses of power. We shall consider the form that this might next in the next chapter.

[85] Prime Minister's Strategy Unit, above n 83, para 7.26.

CHAPTER 8

Regulation by the Courts

A. INTRODUCTION

In the previous chapter, we argued that disclosure regulation aimed at preventing information asymmetry between donors and CSOs will not, by itself, ensure the trustworthiness of organised civil society. In addition, some means of controlling the administrative discretion of trustees, and others who act in a managerial capacity, is likely to be necessary. We have also already noted that, despite the drawbacks of a tribunal as the primary vehicle for regulation, the courts might be a suitable regulator of maladministration.[1] However, the form that this regulation might take has largely escaped the attention of regulation theorists, who prefer to focus on the executive agency as regulator. Accordingly, in this final substantive chapter we consider how this might best be implemented. To this end, it is useful to consider in outline two existing forms of judicial control of maladministration:[2] the public law principles of judicial review and the private law principles of charity proceedings under s 33 of the Charities Act 1993.[3] This necessitates a rather more black-letter analysis than has been undertaken in the preceding chapters. As we shall see, there are 'obvious though not exact' parallels between judicial review and charity proceedings,[4] and between judicial review and the rules of trust law more generally.[5] Comparing the two side-by-side is

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[1] See above Ch 6 at 222 - 226.

[2] An exhaustive comparative analysis is outside the scope of this thesis, although would certainly be of regulatory interest – if nothing else, it would enable us to determine whether the classification of certain charitable activities as 'public functions' will be of significant practical consequence (see above Ch 5 at 163 - 167). Although such classification would render a charity amenable to judicial review, the fact that charity proceedings already provide a means of challenging abuses of power will minimise the impact of this.

[3] This section provides that 'charity proceedings may be taken with reference to a charity … by any person interested in the charity, … [meaning any proceedings] brought under the court's jurisdiction with respect to charities, or … to trusts in relation to the administration of a trust for charitable purposes' (Charities Act 1993, ss 33(1), 33(8)). Note that the Charities Bill 2004 leaves s 33 intact.

[4] *Scott* v *National Trust*, below n 8 at 714 *per* Robert Walker J.

[5] *Edge* v *Pensions Ombudsman* [2000] Ch 602 at 628 *per* Chadwick LJ: 'It seems to us no coincidence that courts, considering the exercise of discretionary powers by those to whom such powers have been entrusted (albeit in different contexts), should reach similar and consistent conclusions; and should express those conclusions in much the same language.' See also *Abacus Trust Co (Isle of Man)* v *Barr* [2003] 1 All ER 763, paras 29 - 30 *per* Lightman J,

useful as it provides a starting-point from which we can begin to develop a system of reviewing maladministration that is specific to organised civil society.[6]

The following analysis considers the way in which charity proceedings and judicial review have dealt with the twin issues of (i) the standing of applicants and (ii) the grounds on which a decision may be challenged,[7] in order to determine whether similar principles ought to govern the regulation of maladministration within organised civil society.

B. THE STANDING OF APPLICANTS

In order for an individual to bring an action for maladministration against an organisation, both public law and charity proceedings require that he must demonstrate an interest in securing its due administration beyond that of the man in the street. *Prima facie*, these rules are quite different, although both are, at heart, concerned with the need to strike a balance between objectives that pull in different directions: the prevention of abuses of power and the protection of organisations from unwarranted harassment.[8]

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on which see Nugee, E., '*Re Hastings-Bass* Again – Void or Voidable? and Further Reflections' (2003) 3 PCB 173. For an opposing view, see Davern, R., 'Impeaching the Exercise of Trustees' Distributive Discretions: "Wrong Grounds" and Procedural Fairness' in Hayton, D. (ed.), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (The Hague and London, Kluwer, 2002) at 454.

[6] Although charity proceedings themselves are specific to organised civil society, the administrative rules enforced by s 33 are very much the creation of private law (as indeed is all charity law): most of the rules which we shall consider below have their origins in trust law and company law and apply with equal force to private sector organisations (specifically, private trusts and non-charitable companies).

[7] A comparative analysis of the remedies available under each system is outside the scope of this thesis. However, this is certainly a matter worth further consideration, given the fact that in judicial review proceedings the court have a wide discretion to refuse to interfere even when it has been shown that an illegal decision has been made, whereas in charity proceedings the courts may only withhold a remedy if the illegal act in question is voidable as opposed to void *ab initio* (see e.g. Lightman J in *Abacus Trust Co (Isle of Man)* v *Barr*, above n 5, paras 29 – 30).

[8] Further, in certain circumstances the two may work in tandem: in the light of *R* v *National Trust for Places of Historic Interest or Natural Beauty, ex parte Scott* [1998] 1 WLR 226 it seems that the judicial review of a charity will fall under the definition of charity proceedings for the purpose of s 33, and will thus operate as a 'double filter' requiring applicants demonstrate standing for both proceedings before the court will grant leave for judicial review (Luxton, P., *The Law of Charities* (Oxford, OUP, 2001) at 528). Tucker J held that where judicial review of a charity is available it will satisfy the definition of charity proceedings (Charities Act 1993, s 33(8)). In light of this, and the fact that s 33(1) of the Charities Act

(1) Charity Proceedings

In order to bring charity proceedings a person must either be a trustee of the charity, or a local inhabitant in the case of a local charity,[9] or otherwise 'interested in the charity'.[10] There is no definitive test to determine whether or not somebody is interested, and there are only a handful of reported cases where the issue has been considered. In *Haslemere Estates v Baker*,[11] Megarry V-C, having rejected the submission that the rules were intended simply to prevent 'officious intermeddlers' from bringing actions,[12] held that only a claimant with:[13]

> some good reason for seeking to enforce the trusts of a charity or secure its due administration … [will] be readily accepted as having an interest.

When determining what will constitute a good reason, the Vice-Chancellor drew a distinction between a person who has an interest *adverse to* the charity (e.g. a contractual claim against the organisation or the trustees) and one who has an interest *in* the charity (e.g. a beneficiary).[14] According to Megarry V-C, only the latter has a sufficiently good reason for the purposes of s 33.[15] Judicial attempts post-*Haslemere*

1993 states that charity proceedings must be only brought by those with an appropriate interest and 'not by any other person', it follows that in order to bring proceedings for judicial review it must be necessary to demonstrate standing for both sets of proceedings. This was timorously approved in *Scott* v *National Trust* [1998] 2 All ER 705 where the applicants of the earlier case applied for a second time for leave to pursue judicial review proceedings. Comparing Tucker J's analysis to that of the Charity Commission, which had granted leave for charity proceedings but not judicial review on the ground that the two were quite separate, Robert Walker J stated that the learned judge's opinion was to be 'preferred' (at 715).

[9] There must be at least two such inhabitants to bring an action.

[10] Charities Act 1993, s 33(1).

[11] [1982] 1 WLR 1109 (concerning an equivalent provision contained in the Charities Act 1963, s 28(1)).

[12] Above n 11 at 1121.

[13] Above n 11 at 1122.

[14] *Ibid.*

[15] It should be noted that the two interests are not mutually exclusive. In *Gunning v Buckfast Abbey Trustees* [1994] TLR 42 a couple who paid for their children to attend a school run by charitable trust were held to be sufficiently interested to bring charity proceedings, as, although they had a contractual relationship with the trustees, they were not seeking to enforce any contractual right; rather, they were seeking the due administration of the charity on behalf of their children as beneficiaries (at 42 *per* Arden J). Similarly, in *Scott* v *National Trust* [1998] 2 All ER 705 (above n 8) the Devon and Somerset and the Quantock staghounds, and a number of tenant farmers, were able to challenge a decision of National Trust to ban fox hunts on its land, as they were held to be partners of the trust 'in a loose, but nevertheless, a real

to define what it means to have an interest in a charity have failed to produce a definition capable of general application. In *Bradshaw v University College of Wales*,[16] Hoffman J stated:[17]

> Without… in any way wishing to essay a definition… I do not consider that a person who could not in any circumstances be a beneficiary of the charity or take any interest under the trusts applicable to the property can be within that expression.

This was regarded as 'unsatisfactory' by the Court of Appeal in *Re Hampton Fuel Allotment Charity*,[18] for two reasons. First, the court rejected the notion that it is necessary to be a beneficiary in order to bring an action. In particular, Nicholls LJ was reluctant to rule out the possibility that the settlor of a charitable trust might have standing – for example, where the charity is for the relief of his poor relations or he retains some administrative control over the trust such as the power to appoint trustees.[19] Second, the court was keen to stress that not every actual or potential beneficiary will have standing, as this class is potentially vast.[20] However, beyond this their Lordships were reluctant to provide a definitive test and instead could only offer two further observations, namely that those who merely (i) have a 'sentimental or altruistic' concern for the charity or (ii) provide it with 'modest financial support' will not have standing.[21]

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sense' in relation to the management of the land in question and the animals contained thereon (at 714 *per* Robert Walker J).

[16] [1988] 1 WLR 190.

[17] Above n 16 at 194.

[18] [1989] Ch 484 at 493 *per* Nicholls LJ.

[19] Above n 18 at 493. However, even where the founder of a charity is sufficiently interested, it is clear that the interest does not extend to his executors, who 'succeed to the property of the deceased; not to [his]… spirit and disembodied wishes' (*Bradshaw v University College of Wales*, above n 16 at 194 *per* Hoffman J; unchallenged by the Court of Appeal in *Re Hampton*, above n 18).

[20] Above n 18 at 493 *per* Nicholls LJ.

[21] *Ibid.* This would suggest that in *Scott* v *National Trust*, above n 8, had there been no partnership between the staghunts and the charity, the members of the hunts would not have been sufficiently interested as mere contributors to the charity's funds through the purchase of hunting licenses.

(2) Judicial Review

Whereas it would seem that in order to bring charity proceedings one must have a sufficient interest in the organisation, standing for judicial review requires a sufficient interest in the subject matter of the review.[22] The leading case is *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*,[23] where it was held that standing is not an issue to be determined in isolation: rather, it must be considered alongside the merits of the applicant's case as whole unless the claim is 'frivolous or vexatious'.[24] In the words of Lord Wilberforce: [25]

> the question of sufficient interest can not… be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest *in the matter to which the application relates*. This… necessarily involves the whole question of the duties of the [public body]… and the breaches or failure of the duties.

This is reinforced by the fact that, in all but the most straightforward cases, standing is not to be decided at the same stage as leave to apply for judicial review but during the main hearing.[26] Thus standing may be partly determined by the seriousness of the particular breach of duty by the public body – such is the 'flexibility' of the sufficient interest requirement.[27] By comparison, in the few reported charity proceedings, standing has each time been treated as a separate stand-alone issue.

Luxton suggests that one of the key differences between the two sets of proceedings is that, in contrast to the rules on standing for charity proceedings, the rules on standing for judicial review provide that only a 'person aggrieved' will be allowed to bring proceedings, and that someone merely interested in due administration will not.[28] In fact, it is now settled that it is not always be necessary for an applicant to demonstrate

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[22] Supreme Court Act 1983, s 31(3).
[23] [1982] AC 617.
[24] Above n 23 at 634 *per* Lord Diplock.
[25] Above n 23 at 630 (original italics). Though note the rather less enthusiastic words of Lord Fraser of Tullybelton, who notes that 'the question whether the respondents have a sufficient interest to make the application at all is a separate, and logically prior, question which has to be answered affirmatively before any question on the merits arises', though accepting that it may sometimes be 'impractical' to separate the two, above n 23 at 645.
[26] Above n 23 at 630.
[27] Above n 23 at 658 *per* Lord Roskill.

a 'direct financial or legal interest' to establish standing.[29] Whilst there must, in theory, be something to distinguish the applicant from the world at large,[30] this can be as little as 'sincere concern for constitutional issues'.[31] The courts have also become increasingly tolerant of judicial review proceedings being brought by pressure groups with no direct interest in the decision that is being challenged. Despite the general rule that:[32]

> the fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest

the courts will recognise standing where an organisation has an expertise in the relevant area,[33] or where there is no other likely candidate to commence proceedings and so potential administrative malpractice would otherwise go unchecked.[34] In the case of charity proceedings, on the other hand, only those with a financial or legal interest will have standing. Those with a financial interest include: (i) a donor of more than 'modest' sums, (ii) an actual or potential beneficiary and (iii) a settlor who continues to give financial support. Those with a legal interest include: (i) a trustee, (ii) a settlor who retains some administrative control and (iii) someone with interest under the same trust and which is dependent on the charitable element.

(3) Review of CSO Maladministration

Despite both procedural and substantive differences, the rules of standing for charity proceedings and judicial review share two key principles. First, both are concerned with shielding organisations from barrages of claims. In *Scott* v *National Trust*, Robert Walker J considered the authorities on s 33 and concluded that:[35]

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[28] Luxton, above n 8 at 529.
[29] *R* v *Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] QB 505 at 520 *per* Schiemann J.
[30] Lest the requirement of sufficient interest lose all meaning: *Ex parte National Federation of Self-Employed and Small Businesses Ltd*, above n 23 at 661 *per* Lord Roskill.
[31] *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552 *per* Lloyd LJ at 562 (though the issue of standing was not disputed before the court).
[32] *Ex parte Rose Theatre Trust Co*, above n 29 at 520 *per* Schiemann J.
[33] *R* v *HM Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.
[34] *R* v *Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386.
[35] Above n 8 at 713.

> The purpose of the filter is … to protect charities from being harassed and put to expense by a multiplicity of claims, which may or may not be well-founded, by persons who may or may not fairly be described as 'busybodies'.

A similar sentiment was expressed in the *Self-Employed* case, where Lord Wilberforce noted that the right to find lack of standing at the application stage, in certain cases,[36] is 'an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications'.[37] Second, the potential harshness of the standing requirements is mitigated by the fact that both the Court of Appeal in *Re Hampton Fuel Allotment Charity*[38] and the House of Lords in the *Self-Employed* case[39] stressed that:[40]

> the question of interest is not simply a bare question of law, but depends on all the circumstances of the particular case,

which should in theory ensure that the rule against official intermeddling does not operate to prevent the review of maladministration where this would otherwise go unchecked – for example, where no-one with appropriate standing is prepared to mount a challenge.[41] From the point of view of reviewing maladministration within organised civil society, these two principles appear to be a useful means of balancing two competing regulatory goals: on the one hand, any regulation designed to foster the sector will wish to keep legal challenges to a minimum in order to conserve CSO resources and ensure that time and money is not diverted away from a CSO's social function and put towards defending an action; on the other, the need to minimise challenges to the sector's trustworthiness[42] suggests that a degree of flexibility is required, so that abuses of power are never neglected by the courts.

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[36] We have already considered that judicial review will usually deal with standing at the main hearing: see above n 26 and associated text.
[37] Above n 23 at 630.
[38] Above n 18.
[39] Above n 23.
[40] *Scott* v *National Trust*, above n 8 at 713 *per* Robert Walker J.
[41] See above Ch 6 at 223 - 225.
[42] See above Ch 4 at 132 - 137.

C. GROUNDS FOR CHALLENGING THE ABUSE OF POWER

In *Council of Civil Service Unions* v *Minister for the Civil Service*,[43] Lord Diplock summarised the existing[44] grounds on which a decision may be challenged by way of judicial review as follows:[45]

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

There is no similarly comprehensive list for charity proceedings. However, the following taxonomy was provided by Robert Walker J (extra-judicially) in the context of reviewing the decision of any trustee, charitable or otherwise, to exercise a power of appointment:[46]

> An appointment made by the trustees may be open to challenge on any of the following grounds: … because the trustees … have failed to satisfy some procedural condition; … because they have gone beyond the permitted scope of the power; [or] … because they have failed to address their minds properly to the exercise of their discretion.

It would seem from this that, *prima facie*, decisions are amenable to challenge for the same reasons under both sets of proceedings,[47] and there would seem to be no reason

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[43] [1985] AC 374.

[44] His Lordship notes that the following list is not exhaustive and suggests that additional grounds, such as lack of proportionality, may be added on an incremental basis (above n 43 at 410). To date, the introduction of this particular ground in a purely domestic context has been rejected by the House of Lords: see *R* v *Home Secretary, ex parte Brind* [1991] 1 AC 696; however, there is considerable overlap between proportionality and the existing ground of irrationality – see below at 258 - 260.

[45] Above n 43 at 410.

[46] Robert Walker J, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226 at 226.

[47] It should be noted at this point that the duties that are imposed upon charity trustees in relation to decision-making vary depending on the organisational structure of the charity in question – whilst certain rules apply regardless of organisational structure (e.g. references to charity trustees in the Charities Act 1993), others only apply to trustees of a charitable trust (e.g. references under the Trustee Act 2000); see generally, Luxton, above n 8 at 336 – 339. However, the duties that compel trustees to (i) act within their powers, (ii) take proper considerations into account, and (iii) satisfy procedural conditions, apply to all fiduciaries, and thus apply to all those who act in a managerial capacity in relation to a charity, regardless of its

why CSO maladministration should not be kept in check by reference to similar principles.

(1) Illegality

According to Lord Diplock, judicial review may be sought on the ground of illegality if the decision maker fails to 'understand correctly the law that regulates his decision-making power and … give effect to it'.[48] The rules of charity law operate on a similar basis. In the words of Hayton:[49]

> Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument or by law … is a breach of trust.

Much of the caselaw regarding illegality is concerned with ensuring that decision-makers take all relevant considerations into account, and do not take account of any irrelevant factors, when making a decision. The fact that private law and public law both independently arrived at this position would suggest that it might also be appropriate to review CSO decisions on this basis. As far as relevant considerations are concerned, we can say three things at this juncture.

First, it is important to note that both judicial review and charity proceedings require that an overlooked relevant consideration (or an irrelevant consideration that was taken into account) must have affected the outcome of the decision before the courts will intervene.[50] It would seem desirable for a similar approach to apply to the challenge of

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structural form. It is trite law that all trustees and directors are fiduciaries. The executive committee of an unincorporated association are also fiduciaries in that they have the capacity to affect the use of the association's funds which, in the case of a charity, will held on trust: either (i) on bare trust for the members (see *Re Recher's WT* [1972] Ch 526) or (ii) on trust for the organisation's charitable purpose.

[48] Above n 43 at 410.

[49] Hayton, D., *Hayton and Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies* (London, Butterworths, 2001) at 792.

[50] For judicial review authority, see above Woolf, H. (Lord Woolf), Jowell, J., and Le Seur, A., *de Smith, Woolf & Jowell's Principles of Judicial Review* (London, Sweet and Maxwell, 1999) at 211; *R* v *Broadcasting Complaints Commission, ex parte Owen* [1985] QB 1153 at 1176 *per* May LJ (taking account of an irrelevant factor is acceptable when coupled with numerous legitimate concerns); *R* v *Bishop of London* (1890) QBD 213 at 226 *per* Lord Esher MR (taking account of an irrelevant factor is acceptable when it does not influence the final decision). For trust law authority, see *Re Hastings-Bass (Deceased)* [1975] Ch 25 at 41 *per* Buckley J; *Mettoy Pension Trustees Ltd* v *Evans* [1990] 1 WLR 1587 *per* Warner J: 'the court will interfere … if it is clear that [the trustee] … *would not have acted as he did*' (italics

CSO decision-making, as otherwise CSOs may find themselves forced to defend futile action that, if successful, would not lead to a different outcome. Furthermore, Lord Walker notes that, in the context of *Hastings-Bass*, to hold otherwise would mean that 'it will be hard for trustees to be confident … that their decisions may not be open to challenge, perhaps years later'.[51] This is particularly significant if we wish to ensure that regulation does not emasculate the entrepreneurial spirit of CSO administration,[52] as allowing too many decisions to be challenged in this way may tend towards anodyne management.

Second, it is clear from *Green* v *Cobham*[53] that financial considerations are relevant factors to be taken into account when trustees exercise their administrative discretion:[54] in this case, the relevant consideration that the trustees of a private trust failed to take into account was the capital gains tax consequences of their decision to exercise their power of appointment. This would seem entirely correct, as trustees have a duty to act in the financial best interests of the beneficiaries (in the case of a private trust) or the charitable purpose (in the case of a charity).[55] Public law, by comparison, is not settled in this area: in *R* v *Broadcasting Complaints Commission, ex parte Owen* the Court of Appeal held that the Broadcasting Complaints Commission should not have taken the financial ramifications of hiring extra staff into account when making a decision.[56] However, financial considerations were held to be relevant in *R* v *Essex CC, ex parte C*, where a local authority was at liberty to refuse free school transport to

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added). Though note that in the case of pensions trusts, the rule may be more relaxed, such that the court may intervene if it shown merely that the decision *might* have been different: see *AMP (UK) plc* v *Barker* [2001] PLR 79; *Hearn* v *Younger* [2002] WTLR 1317; *Stannard* v *Fisons Pensions Trust* [1992] IRLR 27. For a defence of this exception see Hayton, D., *Underhill and Hayton: Law Relating to Trustees* (London, Butterworths, 2002) at 696; for criticism see Hilliard, J., 'Limiting *Re Hastings-Bass*' [2004] Conv 208 at 222.

[51] Walker, R., 'Some Trust Principles in the Pensions Context' in Oakley, A. (ed.), *Trends in Contemporary Trust Law* (Oxford, OUP, 1996) at 129. Noted with approval by Hilliard, above n 50 at 222.

[52] See above Ch 3 at 105 - 111.

[53] [2002] WTLR 1101.

[54] Cf Hayton, who suggests that the rule in *Hasting-Bass* should only apply when the trustees are mistaken as to the effect of a decision, not its consequences (above n 50 at 697); *Green* v *Cobham* would not have been able to take financial considerations into account if this were the case.

[55] *Buttle v Saunders* [1950] 2 All ER 193 (private trust); *Cowan v Scargill* [1985] Ch 270 (pension trust); *Harries v Church Commissioners for England* [1992] 1 WLR 1241 (charitable trust).

the parents' choice of school when there was an equally suitable school closer to the child's home (in respect of which the council was happy to provide transport).[57] So far as CSOs are concerned, it would seem appropriate, in the light of the limited resources available to the sector,[58] to permit financial considerations to play a part in any decision-making except insofar as this is prohibited by the governing document in relation to specific areas of discretion.

Finally, it is important to note that judicial review may require that the government policy on a particular issue is taken into account as a relevant consideration when reaching a decision. In certain circumstances, government circulars (not legally binding in themselves) have been held to be relevant to the decisions of public bodies.[59] It would clearly be inappropriate to require that CSOs take government policy into consideration, as this would have obvious ramifications for the independence of the sector.[60]

(2) Irrational Decisions

A decision may be challenged under judicial review if it is:[61]

> so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

According to de Smith *et al*,[62] a decision may be held up as irrational if it (i) is made in bad faith;[63] (ii) is made arbitrarily or with inappropriate reasoning; (iii) violates the

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[56] Above n 50.
[57] *The Times*, December 9, 1993.
[58] See above Ch 3 at 71 - 72; Ch 4 at 113. Though it must be noted that in many situations public bodies will also be operating from budgets which are as limited as those CSOs, if not more so – consider the Charity Commission itself, which in 2003 has gross administration costs of around £25M (Charity Commission, *Departmental Report – 2003* (Cm 5909, 2003), table 2); by way of comparison, in the same year the National Trust spent £241M on 'the work of the trust' (National Trust, *Annual Report and Accounts 2002/2003* (http://www.national trust.org.uk/ main/nationaltrust/agm/2003/report_accounts.html, National Trust, 2003) at 25.
[59] See e.g. *Dinsdale Developments Ltd* v *Secretary of State for the Environment* [1986] JPL 276; *Richmond-upon-Thames LBC* v *Secretary of State for the Environment* [1984] JPL 24.
[60] See above Ch 2 at 44 - 45.
[61] *Council of Civil Service Unions* v *Minister for the Civil Service*, above n 43 *per* Lord Diplock at 410.

rule that like cases be treated alike; or (iv) is unduly oppressive in its impact. Trust law also prohibits all four of these transgressions: as Hayton notes, in this respect 'the application of the traditional principles [of trust law] seems to cover the same ground' as judicial review.[64] First, the trustees or directors of a charity are under a general duty to act in good faith by virtue of their status as fiduciaries.[65] Second, the rule against the capricious exercise of a fiduciary power or duty – defined by Templeman J in *Re Manisty's Settlement* as being that which is 'irrational, perverse or irrelevant to any sensible expectation'[66] – prevents fiduciaries from acting arbitrarily.[67] Third, under charity law:[68]

> The income and property of the charity must be applied ... with complete fairness between persons who are properly qualified to benefit from it. The trustees of charities with permanent endowment must ... maintain a fair balance between the interests of present and future potential beneficiaries.

Finally, although there are no reported cases that suggest that trustees are under a specific duty not to act in an unduly oppressive manner, it is suggested that any action on the part of the trustees that might infringe such a rule would probably fall foul of the rule against capriciousness.

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[62] Above n 50 at 449 – 450. In addition to the following list, de Smith *et al* include defying reasonable expectations under this head (at 450); a discussion of this is outside the scope of this thesis, though note that such expectations will normally be deemed to be satisfied by a fair hearing on the matter (on which, see below at 262 – 263).

[63] *Roberts* v *Hopwood* [1925] AC 578; *Mayor and Corporation of Westminster* v *London and North Western Railway Company* [1905] AC 426 at 430 *per* Lord MacNaghten.

[64] Above n 50 at 581. See also Worthington, S., *Equity* (Oxford, OUP, 2003) at 133.

[65] *Moody* v *Cox and Hat* [1917] 2 Ch 71 at 83 *per* Warrington LJ; *Bristol and West Building Society* v *Mothew* [1998] Ch 1 at 18 *per* Millett LJ.

[66] [1974] Ch 17 at 26.

[67] *In re Hodges* (1878) 7 Ch D 754 at 762 *per* Malins VC; *McPhail* v *Doulton* [1971] AC 424 at 442 *per* Lord Hodson; at 449 and 456 *per* Lord Wilberforce; *Re Manisty's Settlement*, above n 66 at 26 *per* Templeman J; *Re Hay's ST* [1982] 1 WLR 202 at 209 *per* Sir Robert Megarry VC.

[68] Charity Commission, *CC3: Responsibilities of Charity Trustees* (London, Charity Commission, 2002), para 58. The position comes from general trust law; see e.g. *Nestle* v *National Westminster Bank plc* [1993] 1 WLR 1261 at 1279 *per* Staughton LJ: 'The obligation of a trustee is to administer the trust fund impartially, or fairly (I can see no significant difference), having regard to the different interests of beneficiaries'; also, in the context of pensions trusts: *Cowan* v *Scargill* [1985] Ch 270; *Milhenstedt* v *Barclays Bank International Ltd* [1989] IRLR 522; *Mettoy Pension Trustees Ltd* v *Evans* [1990] 1 WLR 1587; *Edge* v *Pensions Ombudsman* [2000] Ch 602.

So far as the review of civil society maladministration is concerned, it seems reasonable that these four principles should apply to CSOs as well. Certainly it is difficult to see how they would unduly fetter the administrative discretion of CSO decision-makers in any serious way.

(3) Procedural Impropriety

There are substantial differences between charity law and judicial review when it comes to the final category of maladministration: namely, procedural impropriety, which is defined in *Council of Civil Service Unions v Minister for the Civil Service* as being the:[69]

> failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision ... [and] failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred.

Two of the key elements of natural justice are (i) the duty to give reasons for any exercise of discretion and (ii) the duty to hear representations from affected parties before exercising discretion.[70] We shall consider each in turn.

Duty to give reasons

Prima facie, an action for judicial review will not lie simply by virtue of the fact that a decision-maker has failed to disclose the reasons behind his decision to an affected person.[71] However, the issue is inextricably linked with that of relevant considerations

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[69] Above n 43 at 410.

[70] A comprehensive analysis of all procedural impropriety is outside the scope of this thesis. However, we should note that other elements include the principles that decision-makers should act (i) without bias and (ii) without having previously fettered their discretion. Both these principles operate to a greater or lesser extent in both public and private law, and so it is likely that we would expect them to have application in relation to organised civil society as well.

[71] *McInnes* v *Onslow-Fane* [1978] 1 WLR 1520 at 1531 *per* Megarry VC: 'it is clear that there is no general obligation to give reasons for a decision'. See also: *Cannock Chase Council* v *Kelly* [1978] 1 WLR 1 at 8 *per* Megaw LJ; *Antaios Compania Navrica SA* v *Salen Rederiema AB* [1985] AC 191 (where the House of Lords held that even judges should not always provide

and irrationality,[72] for, in the absence of reasons proving otherwise, a claimant may try to assert that a decision was taken illegally or irrationally. According to the House of Lords in *Padfield* v *Minister of Agriculture, Fisheries and Food*,[73] lack of reasons could lead to an inference that the decision was made *ultra vires*, an approach which the Court of Appeal followed in *R* v *Civil Service Appeal Board, ex parte Cunningham*,[74] where it was held that a decision-maker may be required to provide reasons in order demonstrate a decision's legality. However, in the more recent case of *R* v *Secretary of State for Trade and Industry, ex parte Lonrho*,[75] the House of Lords held that unless the other evidence is 'overwhelming',[76] silence alone will not implicate a decision-maker. In other words, no negative inference should be made from a failure to give reasons even in the face of challenge by judicial review.

So far as charity proceedings are concerned, it is necessary to distinguish between charitable companies and charitable trusts (and unincorporated associations based on the trust mechanism). As far as the directors of charitable companies are concerned, there is no general requirement to give reasons for their actions. Although companies are required to minute 'all proceedings at meetings of its directors',[77] there is no requirement that these minutes be made available for the members to inspect.[78] The position under trust law, however, is more complicated. Although the position with regard to a beneficiary's right to view specific documents is unsettled,[79] it is clear, following the decision of the Privy Council in *Schmidt* v *Rosewood Trust Ltd*,[80] that the right to call their trustees to account is an essential characteristic of the trust

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reasons for their decisions); *R* v *Secretary of State for Social Services, ex parte Connolly* [1986] 1 WLR 421 at 431 *per* Slade LJ.

[72] See above at 256 - 258 and 258 - 260 respectively.

[73] [1968] AC 997.

[74] [1991] 4 All ER 310.

[75] [1989] 1 WLR 525.

[76] Above n 75 at 540 *per* Lord Keith.

[77] Companies Act 1985, s 382(1). Where a company also has managers, minutes of managerial meetings must also be minuted by virtue of the same section.

[78] See Companies Act 1985, s 383(1) which only requires the minutes of general meetings

[79] Compare Wilson, R., and Labes, H., '*Schmidt* v *Rosewood*: A Closer Inspection' [2004] PCB 161 at 168 – 169; Lightman, G., 'The Trustees' Duty to Provide Information to Beneficiaries' [2004] PCB 23 at 31.

[80] [2003] 2 AC 709.

mechanism. Without this right, it is difficult to see how the trustee's position would differ, in any meaningful sense, from that of the absolute owner of property.[81]

Right to a fair hearing

Despite a somewhat chequered history,[82] it is clear following *Ridge* v *Baldwin*[83] that the position today is that public law *prima facie* requires a fair hearing to be conducted before making decisions that 'affect to their detriment the rights of other persons or curtail their liberty to do as they please'.[84] Previously it had been thought necessary to demonstrate that a decision was judicial or quasi-judicial, and not administrative, before a hearing was required.[85] However, the nature of what constitutes a fair hearing or whether it may be appropriate to deny any form of hearing (for example, if time is of the essence) depends upon the circumstances of any given case.[86] If the decision determines an individual's 'civil rights and obligation' then, in addition to any common law requirements of procedural fairness, the Human Rights Act 1998 requires

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[81] See *Armitage* v *Nurse* [1998] Ch 241 at 253 – 254 *per* Millett LJ; also Hayton, D., "The Irreducible Core Content of Trusteeship" in Oakley, A. J. (ed), *Trends in Contemporary Trust Law* (Oxford, Clarendon, 1996) at 47; Hayton, D., "The Irreducible Core Content of Trusteeship" (1996) 5 J Int P 3.

[82] On which see Wade, H., and Forsyth, C., *Administrative Law* (Oxford, OUP, 2004) at 476 – 496.

[83] [1964] AC 40.

[84] *R* v *Commission for Racial Equality, ex parte Hillingdon LBC* [1982] AC 779 at 787 *per* Lord Diplock. Note also the attempt at categorisation by Megarry VC in *McInnes* v *Onslow Fane* [1978] 1 WLR 1520 at 1528 – 1529.

[85] See e.g. *Nakkuda Ali* v *Jayaratne* [1951] AC 66 and *R* v *Metropolitan Police Commissioner, ex parte Parker* [1953] 1 WLR 1150, both of which held that the revocation of a trading licence should not be subject to the rules of natural justice because it is an administrative act, rather than a judicial or quasi-judicial one: the decision-maker 'is not determining a question: he is taking executive action to withdraw a privilege' (*Nakkudi Ali* v *Jayaratne*, *ibid* at 78 *per* Lord Radcliffe). In *Ridge* v *Baldwin* the House of Lords confirmed that 'persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice', above n 83 at 130 *per* Lord Hodson.

[86] See *Russell* v *Duke of Norfolk* [1949] 1 All ER 109 at 117 *per* Tucker LJ; cited with approved in *Ridge* v *Baldwin*, above n 83 at 132 *per* Lord Hodson. See also the words of Lord Denning MR in *R* v *Gaming Board for Great Britain, ex parte Benaim and Khaida* [1970] 2 QB 417 at 439: 'It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent'.

that it is informed by a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[87]

Trust law, by comparison, does not require charities to give a fair hearing to those affected by the decisions of its trustees. In *R* v *Charity Commissioners for England and Wales, ex parte Baldwin*,[88] the High Court was asked to consider whether the trustees of an almshouse were under a duty to warn the applicant that her position as almsperson was likely to be terminated in order that she could make representations in her defence. Deciding that the trustees were under no such duty, Beatson QC[89] explicitly recognised the difference between the position under public law and trust law thus:[90]

> The problem [with recognising that the trustees were under such a duty] is that this involves a move from a concept focusing on information available to the person making the decision, the trust concept, to one focusing on the individual's opportunity to be heard, the public law concept.

Review of CSO maladministration

With regard to the duty to provide reasons, there are clearly strong arguments both for and against the application of this principle to CSOs. On one hand, some maladministration will inevitably pass unchecked if it is not always necessary to explain one's actions. On the other, it is clearly in the interests of efficient management that CSOs are not compelled to disclose all paperwork, from 'advertisements for pink pills to blackmailing letters from people who think they have grudge against the trustees'.[91] If unrestricted, the duty to provide reasons may also leave CSOs open to undue interference from trivial claims, although it is to be hoped that appropriately drafted rules of standing would minimise the threat of officious meddlers.[92]

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[87] European Convention on Human Rights, Art 6(1); applicable to 'public authorities' by virtue of the Human Rights Act 1998, s 6(1).
[88] (2001) 33 HLR 48.
[89] Sitting as a Deputy Judge.
[90] Above n 88, para 53.
[91] *Re Londonderry's Settlement* [1964] 3 All ER 855 at 935 *per* Danckwerts LJ.
[92] See above at 253 - 254.

With regard to the duty to give a fair hearing, it would seem reasonable that this principle should have general application for the sector, even where it might seem that such a hearing will not affect the outcome of a particular decision. In the words of Megarry J in *John* v *Rees*:[93]

> "When something is obvious ... why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Although requiring CSOs to give effect to this principle would have an impact on resources, it should be borne in mind that what constitutes a fair hearing will vary according to circumstance – for example, allowing an affected party to make written submissions to be considered by a decision-maker will clearly be less onerous than requiring that they be heard in person.

D. CONCLUSION

This chapter has provided a brief comparative analysis of the key principles that underpin judicial review and charity proceedings, in order to understand the form that the judicial control of maladministration within organised civil society might take. Together with the analysis in the previous chapter of the tools of regulation associated with regulation by executive, it provides an overview of the various strategies that we might wish to employ when regulating organised civil society for the reasons discussed in Chapter Four.

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[93] *John* v *Rees* [1970] Ch 345 at 402.

CHAPTER 9

Conclusion

A. UNDERSTANDING CIVIL SOCIETY

This thesis has discussed when it might be appropriate to regulate organised civil society and how this might best be implemented. In order to answer these questions, the first part of the thesis examined the constitution and social functions of the sector, with the intention of determining: (i) the objectives that we might reasonably expect the sector to fulfil; (ii) the characteristics of CSOs and other features of the sector that facilitate the pursuit of those objectives; and (iii) the characteristics of CSOs and other features of the sector that hinder their pursuit. In Chapter Two, we argued that it is inappropriate to focus on either existing legal definitions or financial definitions of the sector – legal definitions are problematic in that definitions vary from state to state and in many cases predate academic scrutiny of civil society, while financial definitions fail to reflect the fact that CSOs are frequently funded from multiple sources. Instead, we adopted the structural definition articulated by Salamon and Anheier, on the ground that the characteristics which this definition highlights – volunteerism, independence, organisation and non-profit distribution – go some way towards explaining why CSOs are suited to certain social functions.

In Chapter Three, we categorised and critically evaluated the different activities carried out by CSOs by reference to their underlying social functions. We argued that there are eight of these: (i) the provision of market support; (ii) the provision of public goods; (iii) the provision of intangible private services; (iv) the redistribution of wealth; (v) the facilitation of political action; (vi) the provision of cultural services; (vii) the facilitation of self-determination and (viii) the facilitation of entrepreneurialism. We noted in particular that much organised civil society presence is predicated on the notion that the sector is better suited to certain activities than the public and private sectors. In relation to the public sector, we argued that CSOs are likely to be more efficient, expert and insulated from political considerations. In relation to the private sector, we argued that CSOs are likely to be more trustworthy, and also provide different ways of rewarding entrepreneurialism. However, we also noted a number of weaknesses which prevent the sector from maximising its potential

– such as the philanthropic failures identified by Salamon and the challenges to trustworthiness noted by Ortmann and Schlesinger.

B. TOWARDS A THEORY OF CIVIL SOCIETY REGULATION

The second part of the thesis built upon the analysis in Part One in order first to consider when it might be appropriate for the state to intervene and regulate organised civil society as though it were a collective unit. In Chapter Four, we evaluated the traditional economic and social justifications for regulating the private sector, and considered their relevance to CSOs. Accordingly, we argued that regulation of organised civil society may be justified by reference to four grounds: (i) preventing anti-competitive practices, (ii) controlling campaigning, (iii) ensuring trustworthiness and (iv) co-ordinating the sector. We also considered that, in light of the analysis in Chapters Two and Three, regulation may also be justified when it is necessary to (v) rectify philanthropic failures or (vi) prevent challenges to organisational quiddity.

Chapter Five then highlighted some of the practical problems that arise when we treat organised civil society as a collective unit for the purposes of regulation. Specifically, we argued that there is no discretely defined, fixed boundary around the sector which might form a natural limit for the jurisdiction of a regulatory regime. We then considered the nature of the boundary between organised civil society and the charitable sector in England and Wales, and argued that, in the absence of any philanthropic insufficiency or particularism specifically affecting charities, there are no theoretical grounds for focusing regulatory attention solely on the latter.

C. IMPLEMENTING REGULATION

In the final part of the thesis we considered how the rudimentary theory of civil society regulation developed in Chapter Four might best be implemented. In Chapter Six, we noted that an executive agency is traditionally viewed as the most appropriate regulatory body, although we noted that secondary roles may be available for both the judiciary (specifically, in relation to the regulation of maladministration) and self-regulation. In particular, we argued that the institutional efficiency of executive agencies makes this model particularly well-suited to regulating organised civil society, as the blurred and shifting nature of the sector's boundaries, discussed in

Chapter Five, means that it will be necessary to periodically redraw the boundaries of a regulatory regime.

Having concluded in Chapter Six that the two state institutions that we might charge with regulating the sector are an executive agency and the courts, the final two chapters consider how the regulatory strategies available to them might best be used in order to successfully regulate for the reasons given in Chapter Four. Chapter Seven focused on regulation by the executive, and suggested, in particular, that (i) the prevention of anti-competitive practices, (ii) the control of campaigning and (iii) the prevention of challenges to organisational quiddity, lend themselves to regulation by way of command and control, whereas regulation to (iv) enable sector co-ordination and (v) rectify philanthropic failure is better carried out by way of incentive-based regulation. We also noted that, whilst disclosure regulation will go some way towards (vi) encouraging trustworthiness, some form of control over CSO maladministration, possibly to be undertaken by the courts, will also be necessary. Chapter Eight developed this last thought further and provided, in outline, a doctrinal analysis of public law judicial review and private law charity proceedings in order to better understand the form that the judicial control of maladministration within civil society might take.

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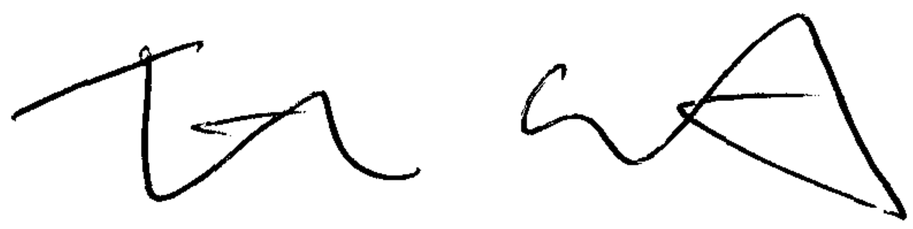
Declaration of Authorship

In accordance with University of London regulations, I hereby declare that the work presented in this thesis is my own.



Jonathan Edward James Garton

30 June 2005